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Richard Albert

*Boston College Law School*, [richard.albert@bc.edu](mailto:richard.albert@bc.edu)

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RICHARD ALBERT\*

## Constitutional Amendment by Constitutional Desuetude†

*Scholars have shown that written constitutions may be informally amended in various ways, for instance by judicial interpretation, statute, or executive action. But scholars have yet to fully appreciate that written constitutions may also be informally amended by desuetude. Informal amendment by constitutional desuetude occurs when a constitutional provision loses its binding force upon political actors as a result of its conscious sustained nonuse and public repudiation by political actors. Though it is a species of informal amendment, constitutional desuetude possesses unique properties. Constitutional desuetude reflects the informal repeal of a constitutional provision as a result of the establishment of a new constitutional convention. Despite its obsolescence, the desuetudinal constitutional provision remains entrenched in the constitutional text. Consequently, although informal amendment generally leaves the constitutional text entrenched, unchanged and politically valid, this particular variation of informal amendment leaves the text entrenched and unchanged but renders it politically invalid. In this paper, I illustrate and theorize the phenomenon of informal amendment by constitutional desuetude with reference to the Canadian Constitution, I construct an analytical framework for identifying constitutional desuetude in other jurisdictions, I distinguish constitutional desuetude from other forms of obsolescence, and I also explore the costs of constitutional desuetude.*

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\* Assistant Professor, Boston College Law School; Yale University (J.D., B.A.); Oxford University (B.C.L.); Harvard University (LL.M.). Email: richard.albert@bc.edu. For helpful comments and conversations, I am grateful to Carlos Bernal-Pulido, Joel Colón-Ríos, Rosalind Dixon, Tom Ginsburg, Ran Hirschl, Vicki Jackson, David Landau, David Law, Daryl Levinson, Sanford Levinson, Geoffrey Lindell, Alec Stone Sweet, Mark Tushnet, Catharine Wells, and to the participants at the inaugural AALS Academic Symposium held in New York City in January 2014. I have also benefited from presenting earlier versions of this Article at Hofstra University, Macquarie University, Queen's University, the University of Alberta, and at the inaugural Montpelier Roundtable on Comparative Constitutional Law. Thank you to the editorial leadership of the American Journal of Comparative Law, particularly Managing Editor Jonathan Zimmer, for helping to prepare this Article for print. The research for this Article was supported by a generous Kolvenbach grant.

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## I. INTRODUCTION

Formal amendment rules often conceal more than they reveal about constitutional change. By definition, formal amendment rules do not reflect the unwritten rules implicit in constitutional amendment.<sup>1</sup> These unwritten rules may sometimes supplement formal amendment rules in conformity with the constitutional text.<sup>2</sup> They may also undermine formal amendment rules, specifically by divesting or significantly restricting the power of formal amendment from political actors to whom the constitutional text assigns the amending power.<sup>3</sup> On other occasions, these unwritten rules may import into the constitutional order meta-constitutional preconditions for making a formal amendment.<sup>4</sup> Formal amendment rules therefore at best provide only an incomplete account of constitutional amendment.

The constitutional text is accordingly *only one* repository for constitutional changes. As I have demonstrated elsewhere in detail with a taxonomy of informal constitutional change,<sup>5</sup> constitutional amendments also occur informally when the constitution changes in meaning without a corresponding change in text,<sup>6</sup> often in the course of the political process, for instance when a national court of last resort interprets the constitution or when new constitutional norms emerge from the interactions of political actors.<sup>7</sup> What qualifies as an “amendment” is therefore broader than its formal definition, and occupies a vast constitutional habitat above and including textual change yet below revolution resulting in wholesale constitutional replacement. Within this category of constitutional change, we can

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1. See Bjørn Erik Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY* 319, 325 (Roger D. Congleton & Birgita Swedenborg eds., 2006).

2. For example, the United States Supreme Court has held that an amendment must be ratified within a reasonable time after its proposal, even though the formal amendment rules in the Constitution do not specify any temporal limitation for ratification. See *Dillon v. Gloss*, 256 U.S. 368, 375 (1921). The Court subsequently narrowed *Dillon* to hold that only Congress may determine what constitutes a reasonable time and that Congress' judgment is a non-justiciable political question. See *Coleman v. Miller*, 307 U.S. 433, 452-55 (1939).

3. For instance, the Indian Supreme Court has informally amended the Indian Constitution by interpretation to impose limitations on the formally-unlimited power of the national legislature to amend the Constitution. See *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 366 (Sikri, C.J.).

4. In Canada, for example, the Supreme Court has identified the following as “underlying constitutional principles” that govern secession and the formal amendment process: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. See *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 48, 92.

5. See Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1060-71 (2014).

6. Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 929 (2007).

7. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 905 (1996).

identify phenomena that are functionally equivalent to a formal amendment, some less-theorized than others. These changes include informal amendment by executive action,<sup>8</sup> major legislation,<sup>9</sup> judicial interpretation,<sup>10</sup> political practice,<sup>11</sup> treaty,<sup>12</sup> and by extracanonical norms.<sup>13</sup> Accordingly, an "amendment" cannot be defined narrowly only as a formal addition to or subtraction from the constitutional text.<sup>14</sup> It is thus now recognized across jurisdictions that written constitutions may be amended both formally pursuant to formal amendment rules and informally by political actors and institutional dynamics.<sup>15</sup>

Written constitutions may be informally amended in a way that scholars have yet to fully appreciate: constitutional desuetude. Constitutional desuetude draws from the related concept of statutory desuetude, which holds that "under some circumstances statutes may be abrogated or repealed by a long-continued failure to enforce them."<sup>16</sup> Statutory desuetude occurs when some combination of the sustained non-application of a law, contrary practice over a significant duration of time, official disregard and the tacit consent of public and political actors leads to the implicit repeal of that law.<sup>17</sup> By analogy, constitutional amendment by constitutional desuetude occurs

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8. For instance, it has been argued that Canada could grant Quebec its independence as an Associate State informally without a formal amendment, using the executive actions of delegation and treaty-making. See R.A. Mayer, *Legal Aspects of Secession*, 3 MANITOBA L.J. 61, 65-66 (1968-1969).

9. See William N. Eskridge, Jr., & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216-17 (2001).

10. See EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES 225-26 (2006).

11. Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1600 (2010).

12. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 805-06 (1995).

13. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 427-48 (2006).

14. Sanford Levinson, *Designing an Amendment Process*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 271, 274 (John Ferejohn et al. eds., 2001).

15. See, e.g., BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15-26 (1998); JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION 260-305 (1994); Charlie Jeffery, *Dimensions of Constitutional Change: Germany and the United Kingdom Compared*, in GERMAN PUBLIC POLICY AND FEDERALISM 197, 203 (Arthur B. Gunlicks ed., 2003); see also S.N. RAY, MODERN COMPARATIVE POLITICS: APPROACHES, METHODS AND ISSUES 117-31 (3d ed. 2004) (discussing formal and informal amendment in comparative perspective).

16. Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 394 (1964).

17. See JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 190 (1921); CASS R. SUNSTEIN, ONE CASE AT A TIME 111 (1999); Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 81 (1976); Mark Peter Henriques, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1068-70 (1990); Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1347-48 (2008).

when an entrenched constitutional provision loses its binding force upon political actors as a result of its conscious sustained nonuse and public repudiation by preceding and present political actors.

Constitutional desuetude hinges on the expiration of a textually entrenched constitutional provision, and is therefore limited to regimes governed by a written constitution. Like other forms of both formal and informal amendment, constitutional amendment by constitutional desuetude works a reordering where a new rule replaces the repudiated rule, and thereafter sets the standard for future conduct by political actors. Desuetude derives partly from nonuse and reflects what can be described as a constructive waiver, affected self-consciously over time, of a right or power. Waiver, in this context, refers to "an intentional relinquishment or abandonment of a known right or privilege."<sup>18</sup> The phenomenon of constitutional desuetude may therefore be understood as a species of legal obsolescence. Legal obsolescence from nonuse or waiver occurs across law, for instance, in property,<sup>19</sup> intellectual property,<sup>20</sup> and in the imposition of a statute of limitations.<sup>21</sup> Legal obsolescence is less common in constitutional law.<sup>22</sup>

Constitutional desuetude is exceptional but demonstrable. Though it is a species of informal amendment, constitutional desuetude possesses unique properties. Constitutional desuetude reflects the *informal repeal* of a constitutional provision as a result of the es-

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18. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

19. For example, title by adverse possession is a prescriptive right acquired by open, notorious, continuous and adverse use over a significant period of time during which the first-in-time party effectively forfeits her title as a result of nonuse of the property. See *Pennsylvania R. Co. v. Donovan*, 111 Ohio St. 341, 349-50 (1924).

20. For instance, in copyright, a proprietor may be shown to have abandoned or waived a copyright with proof of intent to surrender rights in the work. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001).

21. At common law, "a right of action which had once accrued was immortal." *Brooklyn Bank v. Barnaby*, 197 N.Y. 210, 227 (1910). Statutes of limitations are therefore constructions of legislatures. See *Major League Baseball v. Morsani*, 790 So.2d 1071, 1074-75 (Fla. 2001). The purpose of a statute of limitations is to

afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has wilfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which are of value are not usually left to gather dust or remain dormant for long periods of time.

*Wilkinson v. Harrington*, 104 R.I. 224, 236 (1968).

22. Nonetheless, one can understand the waiver of criminal defense rights afforded by *Miranda* protections as giving rise to a species of legal obsolescence of those rights as to a particular set of facts implicating a specific defendant. See *Edwards v. Arizona*, 451 U.S. 477, 482-83 (1981).

tablishment of a new constitutional convention. Despite its obsolescence, the desuetudinal constitutional provision remains entrenched in the constitutional text. Whereas other forms of informal amendments are generally consistent with the constitutional text and therefore assuage the tension between written constitutionalism and unwritten informal constitutional changes,<sup>23</sup> informal amendment by constitutional desuetude aggravates the gulf separating what we might describe as the formal written constitution and the real political constitution.<sup>24</sup> Moreover, whereas other forms of informal amendment leave the text entrenched, unchanged and politically valid, constitutional desuetude leaves the text entrenched and unchanged but renders it politically invalid. Informal amendment by constitutional desuetude thus disproves the conventional view, expressed by United States Supreme Court Justice Felix Frankfurter, that “nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.”<sup>25</sup> Constitutional desuetude shows that something old can effectively be removed from the text without a formal amendment.

For example, in a matter before the European Court of Human Rights, the Court held that extraditing a German citizen, Jens Soering, from the United Kingdom to the United States to stand trial for capital murder would violate the European Convention on Human Rights,<sup>26</sup> specifically Article 3, which prohibits “inhuman or degrading treatment or punishment.”<sup>27</sup> Rather than challenging the constitutionality of capital punishment—the text of the European Convention permits the death penalty in Article 2<sup>28</sup>—Soering argued that his likely delay in awaiting punishment on “death row” would itself constitute inhuman or degrading treatment.<sup>29</sup> The Court agreed.<sup>30</sup> In a concurring opinion, a judge observed that Soering’s claim raised a “more fundamental” question: whether the European Convention’s authorization of capital punishment is still valid.<sup>31</sup> Judge De Meyer suggested that Article 2 of the European Convention had been “overridden by the development of legal conscience and practice” because capital punishment “is not consistent with the pre-

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23. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 45-46 (1998).

24. JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 118 (1996).

25. *Ullmann v. United States*, 350 U.S. 422, 428 (1955).

26. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), 11 E.H.R.R. 439 (1989).

27. CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

28. *Id.* at art. 2.

29. *Soering*, *supra* note 26, at 473.

30. *Id.* at 477.

31. *Id.* at 484.

sent state of European civilization.”<sup>32</sup> In light of the empirical fact that, “*de facto*, [capital punishment] no longer exists in any State Party to the Convention,” it is “repugnant to European standards of justice, and contrary to the public order of Europe.”<sup>33</sup> De Meyer was suggesting, though did not have the analytical framework to argue, that Article 2 had fallen into desuetude, or more specifically that Article 2 was no longer valid despite its continued entrenchment in the text of the European Convention.<sup>34</sup>

This phenomenon of constitutional desuetude remains both under-explored and under-theorized. In this paper, I illustrate and theorize informal amendment by constitutional desuetude with specific reference to the Canadian Constitution. In Part II, I situate constitutional desuetude among related theories of constitutional change. In Part III, I demonstrate that the Canadian Constitution contains four desuetudinal powers as well as two pre-desuetudinal powers. In Part IV, I propose an analytical framework for identifying constitutional desuetude, I distinguish constitutional desuetude from other forms of obsolescence, and I explore the legal and political consequences of constitutional desuetude. Part V concludes with suggestions for further research into constitutional desuetude.

## II. DESUETUDE, NONUSE AND ATROPHY

Scholars have suggested desuetude as a method of constitutional change.<sup>35</sup> They have generally taken two approaches: formalist and functional. In David Law’s recent study of the Japanese Constitution, his short but important inquiry into obsolescence takes a functional perspective.<sup>36</sup> Law identifies what he defines as “zombie provisions,” which “endure in a formal sense but are, for all intents and purposes, dead.”<sup>37</sup> Law recognizes that “there is ultimately little to prevent political actors from developing expectations and coordinating behavior in such a way that formal constitutional rules become practically irrelevant.”<sup>38</sup> In contrast, Lester Orfield illustrates the formalist approach.<sup>39</sup> He argues that only an express act can repeal a constitutional provision.<sup>40</sup> In his roughly one-page discussion of desuetude, Orfield considers only the narrow issue of the desuetude of a *constitu-*

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32. *Id.*

33. *Id.* at 485.

34. I am grateful to Vicki Jackson for suggesting I highlight this example.

35. See *infra* text accompanying notes 39-75.

36. David S. Law, *The Myth of the Imposed Constitution*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 239, 248-50 (Denis J. Galligan & Mila Versteeg eds., 2013).

37. *Id.* at 248.

38. *Id.* at 250.

39. LESTER BERNHARDT ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 81 (1942).

40. *Id.* at 82.

*tional amendment*, asking “whether the Constitution may be indirectly altered through the desuetude of an amendment.”<sup>41</sup> Referring to the Fifteenth Amendment, which he argues “has never been enforced according to its true spirit,”<sup>42</sup> Orfield concludes that since statutes do not expire as a result of non-enforcement, neither does a constitutional amendment insofar as it is “superior to the common law and to statutes.”<sup>43</sup>

#### A. *Functionalism and Constitutional Amendment*

The fullest exposition of the phenomenon of amendment by desuetude appears in Peter Suber’s comprehensive study of constitutional amendment in the United States.<sup>44</sup> In his seven-page discussion, Suber takes a skeptical view of constitutional desuetude.<sup>45</sup> Suber adopts a functional approach, inquiring whether a constitutional provision may be effectively repealed as a result of nonuse.<sup>46</sup> Suber distinguishes between the practical and legal effect of nonuse, and concludes that the neglect of a constitutional provision could create a practical, though not legal, prohibition on its use.<sup>47</sup> Suber refers to the Article V petitioning power, which remains constitutionally entrenched yet has never been invoked.<sup>48</sup> He argues that although it is difficult to contend that states today no longer validly possess the power to petition Congress to call a constitutional convention, the combination of the power’s nonuse and the uncertainty of its operation resulting from its nonuse dim the prospects of its eventual use.<sup>49</sup>

To help clarify how desuetude may achieve the equivalent of a constitutional amendment, Suber makes a useful analogy to amendment by custom. Constitutional change by custom occurs through courts as judges interpret and reinterpret the written and unwritten constitution, writes Suber: “Custom becomes a rule of change for constitutions primarily through the agency of judicial interpretation and reinterpretation, a quasi-official rule of change for constitutions with a strong claim to *de facto* validity.” Suber moreover explains how courts may, through activism or restraint, give effect to changes in custom: “Changes in practice, usage, custom, or popular values commonly affect the interpretation of the constitution, sometimes through judicial ‘activism’ that incorporates such changes, and some-

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41. *Id.*

42. *Id.*

43. *Id.* at 82.

44. PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE* (1990).

45. *Id.* at 233-39 (1990).

46. *Id.* at 233.

47. *Id.* at 234.

48. *Id.*

49. *Id.*



times by judicial 'restraint' that defers to legislative, executive, or administrative departures from firm rules or prior interpretations of the constitution."<sup>50</sup> For Suber, this is the closest we can approach amendment by desuetude.

### *B. Amendment by Convention*

In a leading study on constitutional amendment in Canada, James Ross Hurley devotes three pages to whether the Canadian Constitution is susceptible to amendment by convention.<sup>51</sup> Hurley observes that "there is debate in Canada on whether provisions of the Constitution can become spent or void by convention over time if they are not exercised in practice."<sup>52</sup> Hurley inquires whether such a convention applies to the powers of reservation and disallowance conferred by the *Constitution Act, 1867* upon the federal government.<sup>53</sup> Hurley notes that "some provincial authorities believe that a convention has arisen from the federal practice of not using the powers of reservation and disallowance for over 50 years (they had been rather vigorously exercised from 1867 to 1941), and that this convention has made them inoperative."<sup>54</sup> The question, he writes, is therefore whether a constitutional convention has today developed against the use of powers nonetheless entrenched in the text of the Canadian Constitution.<sup>55</sup>

On Hurley's analysis, nonuse must be considered binding by political actors in order for a convention to apply.<sup>56</sup> Hurley finds that no such binding convention exists.<sup>57</sup> Citing a statement by then-Prime Minister Pierre Elliot Trudeau in 1975 refusing to disallow a provincial law and stating that "only in rare cases" should the federal government invoke the power,<sup>58</sup> Hurley reasons that this position means that neither the power of reservation nor disallowance is obsolete today because "no federal government has indicated a contrary view to the position enunciated in 1975."<sup>59</sup> Hurley therefore concludes that "the powers of reservation and disallowance do not therefore appear to be spent as a result of a convention."<sup>60</sup> I reach the opposite conclusion in this paper. Drawing from law, history and politics, I conclude that the Canadian Constitution is indeed suscepti-

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50. *Id.* at 236.

51. See JAMES ROSS HURLEY, *AMENDING CANADA'S CONSTITUTION: HISTORY, PROCESSES, PROBLEMS AND PROSPECTS* 14-16 (1996).

52. *Id.* at 14.

53. *Id.* at 14-15.

54. Hurley, *supra* note 51, at 15.

55. *Id.*

56. *Id.* at 16.

57. *Id.*

58. *Id.* at 15.

59. *Id.* at 16.

60. *Id.*

ble to amendment by convention—a point on which both Hurley and I agree. I argue in contrast to Hurley, however, that the entrenched powers of reservation and disallowance have indeed lost their binding force upon political actors.<sup>61</sup>

There are three difficulties with Hurley's analysis. First, he relies on one statement by one political actor to reach a conclusion about which only deep and broad consensus can be convincing.<sup>62</sup> That one political actor at one time feels bound by a rule cannot prove the existence of a convention. Second, Hurley interprets the *nonuse* of the disallowance power as proof that it remains usable.<sup>63</sup> It seems odd to argue that refraining from doing something proves that doing that very thing is the conventional choice. Finally, third, Hurley elides between disallowance and reservation. He cites the refusal to invoke the disallowance power as proof that both disallowance *and* reservation are not yet obsolete.<sup>64</sup> This is the most problematic part of his analysis. Each power must be evaluated *separately*. Although they are tied to each other, as I recognize below,<sup>65</sup> the powers have different and distinguishable histories warranting separate analyses as to whether one or the other is or not obsolete. Yet Hurley conflates the two.

### C. *Constitutional Atrophy*

More recently, Adrian Vermuele has shown that constitutional powers may atrophy from nonuse.<sup>66</sup> Vermuele observes this phenomenon in constitutional systems with either a written or an unwritten constitution; he does not focus, as I do, on the process and costs of the desuetude of an entrenched constitutional provision. Moreover, Vermuele does not theorize that a constitution may be informally amended by desuetude. His insights are nevertheless relevant to the study of constitutional amendment. Vermuele's thesis is twofold: the first part is an observation and the second is a prescription. First, Vermuele observes that written or unwritten constitutional powers may atrophy gradually into nonuse and illegitimacy after a period of valid use and legitimacy such that a convention emerges under which political actors may no longer invoke them.<sup>67</sup>

Drawing from Canada, the United States and the United Kingdom, Vermuele surveys five examples of atrophied constitutional

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61. See *infra* Subsection III.B.2.

62. Hurley, *supra* note 51, at 15

63. *Id.* at 15-16.

64. *Id.* at 16.

65. See *infra* Subsection III.B.2.

66. Adrian Vermuele, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL. STUD. 421 (2012).

67. *Id.* at 421.

powers.<sup>68</sup> Vermuele explains that these powers have "passed from the domain of powers that are in fact exercised, to those that might be exercised but are not, to those that may not be exercised at all."<sup>69</sup> The reason for their nonuse, hypothesizes Vermuele, is a political precedent heuristic where the uninformed general public and political elites infer from the historical nonuse of a power that its proposed use is illegitimate or contrary to the "constitutional rules of the game."<sup>70</sup> The second part of Vermuele's thesis is prescriptive. In order to counteract this phenomenon of constitutional atrophy, Vermuele recommends that political actors should deploy their constitutional powers, if even on meaningless occasions, only to preserve the robustness and legitimacy of those powers.<sup>71</sup>

Vermuele's theory of constitutional atrophy does not claim that constitutions are informally amendable by desuetude, but both theories share two important similarities. First, Vermuele identifies nonuse of a constitutional power as an indicator of constitutional atrophy. In the vocabulary of informal amendment, nonuse of a constitutional power could be understood as leading to constitutional desuetude and ultimately to constitutional invalidity. Second, among Vermuele's five examples of constitutional atrophy, I develop one of them as an illustration of constitutional desuetude, and I reject another as only pre-desuetudinal.<sup>72</sup> Still, both theories reflect a fundamental difference: Vermuele develops his theory with reference to both written and unwritten constitutions whereas I argue that constitutional desuetude is possible only in jurisdictions governed by a written constitution. Writtenness is therefore a necessary condition to constitutional desuetude, which in turn entails costs unique to written constitutionalism.

### III. CONSTITUTIONAL DESUETUDE IN CANADA

Informal amendment by constitutional desuetude therefore remains undertheorized. In this Part, I illustrate how textually entrenched provisions fall into desuetude with specific reference to the Canadian Constitution. I discuss six examples, two which may be in the very early stages of constitutional desuetude and whose meaning has therefore not yet changed but perhaps one day could. Using these examples, I show that nonuse alone cannot informally amend an entrenched provision into constitutional desuetude. First, however, I define the concept of desuetude and describe how it arises outside of the statutory context in the constitutional one.

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68. *Id.* at 424-25.

69. *Id.* at 426.

70. *Id.*

71. *Id.* at 423.

72. See *infra* Section III.C.

### A. *The Concept of Constitutional Desuetude*

To say that a provision has fallen into desuetude is to highlight its nonuse and to suggest that it is now obsolete. This begs the question how a provision becomes obsolete as a result of nonuse. Hans Kelsen defines desuetude as a “negative custom,” whose “essential function is to abolish the validity of an existing norm” as a result of “never being applied or obeyed.”<sup>73</sup> On this view, a legal norm loses its validity as authorities fail to enforce it and the public ceases to abide by it. In addition to a failure to enforce and public rejection, desuetude also entails a temporal dimension: a given rule must remain unenforced and rejected over a significant period of time before falling into desuetude. Accordingly, Arthur Bonfield explains that “a statute would fall into desuetude only if the long failure to enforce it was in the face of a public disregard so prevalent and long established that one could deduce a custom of its nonobservance.”<sup>74</sup> Neither time, nonuse nor rejection alone is sufficient to establish desuetude.

#### 1. Defining Desuetude

Desuetude entails official disregard for a written rule, most commonly a statute.<sup>75</sup> Statutes may fall into desuetude as a result of either a long-ago enactment pursuant to which there are few or selective contemporary prosecutions, or open violation without consequence, or no longer “connect[ing] with existing public convictions” in a given jurisdiction.<sup>76</sup> Cass Sunstein states the point in terms of legitimacy: “[w]hen a law is so inconsistent with people’s values that it cannot, in a democracy, be much enforced, it loses its legitimacy. It has no claim to regulate conduct at all.”<sup>77</sup> Ronald Allen echoes this view, describing desuetude as “the ancient doctrine that long and continuous failure to enforce a statute, coupled with open and widespread violation of it by the populace, is tantamount to repeal of the statute.”<sup>78</sup> Desuetude may therefore be understood in terms of three elements: significant time, conscious nonuse, and repudiation. All three elements—the (1) sustained (2) conscious nonuse of a rule that has been (3) publicly repudiated by political actors—are necessary to render a rule desuetudinal.

Desuetude originated in the civil law. In his 1921 study on *The Nature and Sources of the Law*, John Chipman Gray traced the devel-

73. HANS Kelsen, *PURE THEORY OF LAW* 213 (Max Knight transl. 2d ed. 1978).

74. Bonfield, *supra* note 16, at 396.

75. The concept is most relevant to the criminal law. See *Desuetude*, 119 HARV. L. REV. 2209 (2006) (discussing the use of desuetude in courts and recommending its use in American courts).

76. Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1157 (1997).

77. CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 53 (2003).

78. Allen, *supra* note 17, at 81.

opment of desuetude to the Roman jurist Julianus who described desuetude as giving rise to binding law because, like a written law, it enjoys public acceptance: "long continued custom is not improperly regarded as equivalent to a statute, and what is pronounced to be established by usage is law. For since the statutes themselves are binding on us for no other reason than that they are accepted by the people, it is proper also that what the people have approved without any writing shall bind everyone."<sup>79</sup> Julianus stressed the public dimension of desuetude, asking "[f]or what difference is there whether the people declares its will by a vote or by its very acts and deeds?"<sup>80</sup> In answer to his own question, he again drew upon public acceptance: "Wherefore very rightly this also is held, that statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all."<sup>81</sup> Therefore, in the civil law, judges can find statutes abrogated by desuetude and hence void.<sup>82</sup>

In the common law tradition, however, courts do not recognize the doctrine of desuetude.<sup>83</sup> Under English common law, a statute cannot be repealed by custom or usage, and thus cannot succumb to desuetude.<sup>84</sup> Given its foundations in the English common law, Canada likewise does not recognize the doctrine of desuetude. As a former Canadian judge wrote, "old statutes may be ignored or forgotten but do not die; repeal by desuetude is unknown to our constitutional law."<sup>85</sup> Nor does the United States recognize desuetude.<sup>86</sup> Desuetude is, however, recognized in Scotland, where it is "one of the most distinctive characteristics of the Scottish legal sys-

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79. GRAY, *supra* note 17, at 190 n.2 (quoting Julianus).

80. *Id.*

81. *Id.*

82. Bonfield, *supra* note 16, at 399-400. Some civil law traditions reject the judiciary's power to abrogate statutes for desuetude and instead adopt a more rigid, formal and positivist approach to law. *Id.* at 400-01.

83. *The Elimination of Obsolete Statutes*, 43 HARV. L. REV. 1302, 1304-05 (1930); see also THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 337-38 (1956) (observing that although there was "speculation during the middle ages as to whether a law could become inoperative through long-continued desuetude," the idea ultimately "found little favour" in England).

84. GRAY, *supra* note 17, at 193.

85. *Webb Real Estate Limited v. McInnis, Meehan & Tramble*, (1977) 20 N.S.R. (2d) 6, at para. 82 (N.S.) (MacKeigan C.J., concurring), *reversed on other grounds by Smith v. McInnis*, [1978] 2 S.C.R. 1357.

86. *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 113-14 (1953); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 263 (2003). Desuetude is unrecognized in federal courts but it has been recognized in some state courts. See *Judicial Abrogation of the Obsolete Statute: A Comparative Study*, 64 HARV. L. REV. 1181, 1186-89 (1951). Today, West Virginia is the only American jurisdiction to recognize desuetude. See Committee on Legal Ethics of the West Virginia State Bar v. Printz, 416 S.E.2d 720, 726-27 (W.Va. 1992). Nonetheless, Guido Calabresi has argued that American federal courts *should* have the authority to update obsolete statutes. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 142 (1982).

tem,”<sup>87</sup> understood to require significant time, nonuse, and public repudiation.<sup>88</sup>

One of the reasons why desuetude may be so rarely recognized, posits Gray, is due to “the comparative ease of obtaining new legislation” to repeal a desuetudinal law.<sup>89</sup> Where a law has been officially repudiated and unenforced for a significant period of time, public support often suffices to compel the legislature to repeal it.<sup>90</sup> Yet Bonfield suggests that this view is incomplete. Legislators face significant obstacles to repealing a desuetudinal law, including opposition from minority interest groups, whose persistent and well-organized lobbying can prevent legislative action even when a majority might otherwise support it.<sup>91</sup> We are therefore more likely to see prosecutors engage in conscious non-enforcement of a desuetudinal law, what Bonfield calls “an administrative emasculation of an obsolete statute,” rather than a serious legislative effort to repeal it.<sup>92</sup>

## 2. Constitutional Desuetude

A constitutional provision is similarly susceptible to sustained conscious nonuse and public repudiation. Where a constitutional provision falls into desuetude, repealing it through the process of formal amendment generally entails a higher degree of difficulty than repealing a law. Differential amendment difficulty is generally one of the features that distinguishes a constitution from a law, the former being more difficult to formally amend because it constitutes the regime’s legal institutions, which in turn regulates its political ones.<sup>93</sup> As Hans Kelsen explained, “since the constitution is the basis of the national legal order, it sometimes appears desirable to give it a more stable character than ordinary laws. Hence, a change in the constitution is made more difficult than the enactment or amendment of ordinary laws.”<sup>94</sup>

I use *constitutional desuetude* as a short-hand for *informal amendment by desuetude*. Constitutional desuetude is a form of informal amendment but it also possesses unique properties that distinguish it from other forms of informal amendment. Under other forms of informal amendment, the constitutional text reflects continuity in the regime’s legal and political realities insofar as an

87. J.R. Philip, *Some Reflections on Desuetude*, 43 JURID. REV. 260, 260 (1931).

88. *Id.* at 260-61 (quoting *Brown v. Magistrates of Edinburgh*, S.L.T. 456, 458 (1931)).

89. Gray, *supra* note 17, at 192.

90. *Id.* at 193.

91. Bonfield, *supra* note 16, at 390.

92. *Id.*

93. See Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 231-32 (2013).

94. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 259 (Anders Wedberg transl. 1945).

informal amendment does not alter the actual text of the constitution but rather supplements or clarifies it. In contrast, constitutional desuetude reflects a disjuncture between the regime's legal and political reality: the desuetudinal constitutional provision remains entrenched in the text, not yet nor perhaps ever-to-be repealed, despite being rendered politically inoperative as a result of conscious nonuse. Therefore whereas other forms of informal amendment generally leave the constitutional text unchanged and politically valid, constitutional desuetude leaves the text unchanged but renders it politically invalid.

The engine for constitutional desuetude is temporal. Over time, a given constitutional provision becomes unused by political actors, and as the nonuse continues for a significant duration, its sustained nonuse sets an expectation of future nonuse. The nonuse of the given provision may be attributable to new or evolving political customs, institutional relationships or public norms. The nonuse of the provision may also be caused or prolonged, and in either case is ratified, by its public repudiation. The life cycle of a provision falling into constitutional desuetude therefore evolves from entrenched to unused to unuseable.

### 3. The Rule of Recognition and Constitutional Conventions

H.L.A. Hart's theory of the rule of recognition, which offers a way to identify the primary and secondary rules to which we are bound,<sup>95</sup> helps conceptualize how constitutional desuetude transforms an entrenched provision *from* used and useable *to* unused and unuseable. On Hart's account, political actors may feel themselves variously bound to rules entrenched in a constitutional text, passed by a legislative body, articulated by a court, or even by rules with a long customary practice.<sup>96</sup> But which rules are binding and which are not? The rule of recognition is the standard to evaluate which rules are binding. It establishes "a rule for conclusive identification of the primary rules of obligation"<sup>97</sup> that "will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."<sup>98</sup>

The rule of recognition identifies whether an entrenched constitutional rule has lapsed from useable to unuseable. Where a constitutional rule loses its political validity and therefore no longer compels political actors to conform their conduct to it, the rule of recognition identifies that rule as divested of its binding quality and

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95. H.L.A. Hart, *The Concept of Law* 94 (2d ed. 1994).

96. *Id.* at 95.

97. *Id.*

98. *Id.* at 94.

therefore no longer a primary rule of obligation. For Hart, what exercises this binding quality upon political actors is convention, which he understands as a “shared acceptance,”<sup>99</sup> a “guiding rule[ ],”<sup>100</sup> an unstated obligation: “For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisors.”<sup>101</sup> The most relevant community for recognizing the binding quality of a rule, argues Hart, is the legal elite, in particular judges.<sup>102</sup> Constitutional desuetude accordingly occurs where the rule of recognition changes the legal elite’s perception of a rule from binding political actors at Time 1 to not at Time 2.

If the engine for constitutional desuetude is time, the vehicle is a convention. Constitutional conventions are the body of understandings, habits, or practices that regulate the conduct of political actors.<sup>103</sup> Whether political actors feel bound by the conventional rule is the critical part of the inquiry because courts will not enforce constitutional conventions.<sup>104</sup> Conventions are instead policed in the political process by political actors themselves, and the consequences of violation are political, not legal. Conventions may therefore be understood as representing the “constitutional morality” that informally governs what political actors do or not.<sup>105</sup> In this way, conventions are distinguishable from both legal and moral rules. They are not legal rules since they are not created in courts or the legislature, nor are they moral rules because they are determined by political action and agreement that would be morally neutral absent that chosen action or agreement.<sup>106</sup>

Conventions arise and evolve by a mixture of action, agreement and acquiescence. The development and entrenchment of conventions “ultimately reflect what people do.”<sup>107</sup> Conventions can therefore change over time, for instance by the “deliberate abrogation of an old convention or creation of a new one by agreement, if the old rule is felt to be outdated or inconvenient.”<sup>108</sup> No convention is timeless and none is absolute; conventions will survive as long as they are followed, and political actors may choose to depart from conventions as they change or develop in application to new factors.<sup>109</sup> Political ac-

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99. *Id.* at 102.

100. *Id.*

101. *Id.* at 101.

102. *Id.* at 256.

103. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION cxli (Liberty Fund 8th ed. 1915).

104. *Id.*

105. *Id.*

106. GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 216-17 (1984).

107. *Id.* at 217.

108. *Id.*

109. *Id.*



tors are bound by conventions only insofar as conventions "cannot be changed unilaterally and must be complied with if in force until changed by agreement."<sup>110</sup> It is in this sense that conventions reflect a constitutional morality without being moral: they exist to structure and to guide action but are subject to change when political actors agree to change them.<sup>111</sup> Conventions exert constraining effect as a result of what Curtis Bradley and Trevor Morrison describe as "norm internalization," which results when political actors have internalized the governing legal norms, whether written or not.<sup>112</sup>

Ivor Jennings has developed a three-part test to identify a constitutional convention. Jennings asks three questions: (1) are there precedents?; (2) do the actors involved in the precedents believe they are bound by a rule?; and (3) is there a reason for the rule?<sup>113</sup> Jennings explains that a convention exists when a practice has identifiable precedents, but he insists that "practice alone is not enough."<sup>114</sup> In following the practice, political actors must also believe that they ought to follow it.<sup>115</sup> Their choice to follow the practice must moreover be motivated by a functionalist view of its fit within the present functioning of government, namely that they and their successors ought to follow the practice "because it accords with the prevailing political philosophy" and "it helps to make the democratic system operate; and enables the machinery of State to run more smoothly; and if it were not there friction would result."<sup>116</sup> Precedents are therefore necessary to the creation of a constitutional convention but they are insufficient on their own to establish one. Precedents, writes Jennings, create rules of conduct embodied in conventions, "which accord with the developing principles of constitutional government" and which are justified "not merely by precedents but also by reason."<sup>117</sup>

### *B. Desuetudinal Powers: British and Canadian Reservation and Disallowance*

Applying our understanding of constitutional conventions, we can perceive two pairs of desuetudinal provisions in Canada. I demonstrate in this Section that the British powers of disallowance and reservation, both entrenched in the Canadian Constitution,<sup>118</sup> as

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110. *Id.*

111. *Id.*

112. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097, 1132 (2013).

113. W. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 136 (5th ed. 1967).

114. *Id.* at 135.

115. *Id.*

116. *Id.* at 136.

117. W. IVOR JENNINGS, *CABINET GOVERNMENT* 9 (1936).

118. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), pt. IV, ss. 55-57; pt. V, s. 90 (hereinafter "*Constitution Act, 1867*").

well as their Canadian counterparts, likewise entrenched in the Canadian Constitution,<sup>119</sup> have been informally amended by constitutional desuetude. I also demonstrate in the subsequent Section that the federal and provincial powers of legislative override, both entrenched in the Canadian Constitution,<sup>120</sup> may be entering the early stages of desuetude. These pre-desuetudinal powers of legislative override are a useful study of the onset and entrenchment of constitutional desuetude.

Under the Canadian Constitution, the power of reservation belongs to both the British and Canadian governments. The *Constitution Act, 1867* grants the Governor General the power to "reserve" a bill.<sup>121</sup> After both houses of the Canadian Parliament pass a bill, it is sent to the Governor General, who may make one of three choices: assent to the bill on behalf of the monarch, in which case it becomes law; deny assent, in which case the bill does not become law; or reserve the bill for further instructions from British government.<sup>122</sup> Where the Governor General reserves the bill, it does not become law unless the British government assents to the bill, which it must do within two years, otherwise the reserved bill expires.<sup>123</sup> The Canadian government possesses the same power of reservation over provincial legislation.<sup>124</sup>

The power of disallowance similarly belongs to both the British and Canadian governments. The *Constitution Act, 1867* authorizes the British government to "disallow," or repeal, a law passed by the Parliament of Canada.<sup>125</sup> Following its notification that the Parliament of Canada has adopted a law—which means that the bill has been approved by the House of Commons and the Senate, and been signed into law by the Governor General—the British Government has two years to annul it.<sup>126</sup> The Canadian government possesses the same power of disallowance with respect to provincial legislation.<sup>127</sup>

119. *Id.* at s. 90.

120. *Canadian Charter of Freedoms*, s. 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) (hereinafter "*Charter*").

121. *Constitution Act, 1867*, ss. 55, 57. The Governor General is the official representative of Canada's Head of State, which is the Queen or King of Canada, a position held concurrently by the Queen or King of the United Kingdom. The Governor General possesses and may exercise the powers of the monarch. See PATRICK N. MALCOLMSON & RICHARD MYERS, *THE CANADIAN REGIME: AN INTRODUCTION TO PARLIAMENTARY GOVERNMENT IN CANADA* 99-103 (2009).

122. *Constitution Act, 1867*, pt. IV, s.55.

123. *Id.* at pt. IV, s.57.

124. *Id.* at pt. V, s.90. The power is the same but its execution differs insofar as the Lieutenant Governor of a province exercises the role of the Governor General, and the reserved provincial bill expires after one year, not two. *Id.*

125. *Id.* at pt. IV, s.56.

126. *Id.*

127. *Id.* at pt. V, s.90. The power is the same but its execution likewise differs insofar as the federal government exercises the role of British Government, and it has one year, not two, to disallow the provincial law. *Id.*

## 1. British Reservation and Disallowance

The British powers of reservation and disallowance have not been used for over a century. They have been used only once and twenty-one times, respectively, since their entrenchment in the *Constitution Act, 1867*.<sup>128</sup> The last year the British government exercised its constitutional power of reservation was 1878, and its first and only exercise of disallowance occurred in 1873.<sup>129</sup> The reservation power began to lapse when the British government changed its instructions to the Governor General.<sup>130</sup> Initially, the Governor General operated under instructions issued in 1867 to reserve Canadian bills on any of eight subjects.<sup>131</sup> The list of subjects included any bill authorizing divorce, conferring upon the Governor General anything of value, creating new legal tender, committing Canada to obligations inconsistent with existing British treaties and, among others, containing provisions the Crown had in the past refused or disallowed.<sup>132</sup> Later in 1878, the Governor General received new instructions removing these grounds for reserving bills.<sup>133</sup>

The new instructions and the resulting decline in the use of the reservation power are at least partly attributable to the Canadian government's lobbying efforts. In 1876, Canada wrote to the Secretary of State for Colonies to request greater independence.<sup>134</sup> The letter stressed that Canada deserves "special consideration" because its differences make the country "unsuitable" for what "may be eminently suited to some of the Colonies."<sup>135</sup> Canada, in other words, was exceptional, and should not be treated like other colonies.<sup>136</sup> The Canadian government expressly requested that the British government cease exercising its power of reservation.<sup>137</sup> The Canadian government simultaneously sought also to assuage the British government's concerns that discontinuing use of the power of reservation would nullify all of the British government's supervisory powers—Canada reminded the British government that the power of disallow-

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128. PETER W. HOGG, *I CONSTITUTIONAL LAW OF CANADA* at 3.1, 3-2 n.5 (5th ed., 2007) (2012 update).

129. *Id.*

130. J.E.C. MUNRO, *THE CONSTITUTION OF CANADA* 165-66 (1889).

131. *Draft of Instructions to be Passed Under the Royal Sign Manual and Signet to Viscount Monck, Governor General of Canada*, in *SESSIONAL PAPERS OF THE PARLIAMENT OF THE DOMINION OF CANADA*, Volume 7, No. 22, art. VII.1-8 (1867-68).

132. *Id.*

133. *Draft of Instructions passed under the Royal Sign-Manual and Signet to the Governor-General of the Dominion of Canada, 1878*, in *SESSIONAL PAPERS OF THE PARLIAMENT OF THE DOMINION OF CANADA*, Volume 8, No. 14, art. IV (1879).

134. *Report: The Minister of Justice on his Official Action Under the Minute of Council of 29th May, 1876, on Certain Public Matters*, in *SESSIONAL PAPERS OF THE PARLIAMENT OF THE DOMINION OF CANADA*, Volume 7, No. 13 (1877).

135. *Id.*

136. *Id.*

137. *Id.*

ance would remain available for it to use should any Canadian law conflict with British interests.<sup>138</sup>

The Governor General has not once exercised the power of reservation since the new instructions were issued in 1878.<sup>139</sup> The change in instructions reflected Canada's growing stature,<sup>140</sup> and was an early step toward Canadian autonomy. Canada's newfound independence gave it more power than any other British colony.<sup>141</sup> The new instructions proved effective: in 1878, the Governor General assented to a bill relating to divorce,<sup>142</sup> one of the eight grounds upon which he would have earlier been compelled to reserve the bill.<sup>143</sup> The British government did not exercise its power of disallowance either thereafter—not since its first and only time in 1873.<sup>144</sup> It nonetheless remained available to the British government to govern Canada.<sup>145</sup>

Both reservation and disallowance were ultimately rejected as Canada gradually achieved independence, as exhibited in the Balfour Declaration of 1926, the 1930 Report on Dominion Legislation, and the Statute of Westminster of 1931. The Balfour Declaration recognized Canada and other Commonwealth countries as "self-governing communities" and described them as "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."<sup>146</sup> The Declaration also signalled the end of the office of the Governor General as anything but a largely ceremonial representative of the British Crown. As the Declaration states, the Governor General "is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government."<sup>147</sup> Canada would soon possess the power to make its own decisions as to its affairs.<sup>148</sup>

The 1930 Report confirmed Canada's growing independence: it led to an agreement that the British powers of disallowance and res-

138. *Id.*

139. HOGG, *supra* note 128, at 3.1, 3-2 n.5.

140. ARTHUR PIERRE POLEY, *THE FEDERAL SYSTEMS OF THE UNITED STATES AND THE BRITISH EMPIRE: THEIR ORIGIN, NATURE AND DEVELOPMENT* 217 (1913).

141. ALPHEUS TODD, *PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES* 116 (1894).

142. JOHN GEORGE BOURINOT, *PARLIAMENTARY PROCEDURE AND PRACTICE IN THE DOMINION OF CANADA* 695 (1903).

143. *Instructions to the Governor-General of the Dominion of Canada, 1878*, in *SESSIONAL PAPERS OF THE PARLIAMENT OF THE DOMINION OF CANADA*, Volume 8, No. 14, art. IV (1879).

144. HOGG, *supra* note 128, at 3.1, 3-2 n.5.

145. CHARLES M. ANDREWS, *THE ROYAL DISALLOWANCE* 5 (1914).

146. Balfour Declaration, Imperial Conference, Inter-Imperial Relations Committee, pt. II, at 2 (1926).

147. *Id.* at 3.

148. *Id.* at 4.

ervation would not be used in Canada.<sup>149</sup> By 1930, the British Government could not conceivably refuse assent or reserve a bill.<sup>150</sup> One year later, the Statute of Westminster gave effect to the Balfour Declaration and the 1930 Report, neither of which was a formal legal document. The Declaration had been only a political understanding and the 1930 Report had no binding effect on British or Canadian political actors. It took the Statute of Westminster to "dissolve the formal legal subordination of the self-governing dominions to the imperial Parliament," explains Peter Russell.<sup>151</sup> The Statute of Westminster removed the power of the Parliament of the United Kingdom to legislate for Canada, unless by consent, and it effectively abolished the British powers of reservation and disallowance.<sup>152</sup>

The Canadian Supreme Court has pointed to the Statute of Westminster as one of the key moments leading to Canadian sovereignty.<sup>153</sup> The Statute of Westminster conferred upon Canada as a legal matter the independence it had acquired as a political matter. We may understand the Statute as implicitly repealing the British powers of reservation and disallowance as to Canada. Both have been effectively repealed by constitutional desuetude yet both remain unaltered in the text of the *Constitution Act, 1867*. Canadian constitutional law now operates pursuant to a new rule of recognition: the British powers of reservation and disallowance are no longer binding as primary rules of obligation. They had lost political validity before losing legal validity with the enactment of the Statute of Westminster. They have not been invoked since the 1870s despite remaining entrenched to this day in the constitutional text. One could perhaps reconcile the text with actuality by arguing that the *Constitution Act, 1982* implicitly repealed the vestiges of colonialism entrenched in the *Constitution Act, 1867*, but this only magnifies the disjunction between the formal and real constitution in Canada.<sup>154</sup>

## 2. Canadian Reservation and Disallowance

In his study on federalism, Kenneth Wheare examines the Canadian powers of disallowance and reservation in terms of usage or convention.<sup>155</sup> Defining usage as "some usual way of behaving which governments follow but which they do not recognize as completely

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149. Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929, at 16 (1930); *id.* at 19.

150. W.P.M. Kennedy, *The Constitution and its Workings*, in 6 THE CAMBRIDGE HISTORY OF THE BRITISH EMPIRE: CANADA AND NEWFOUNDLAND 686, 701 (J. Holland Rose et al. eds., 1930).

151. PETER H. RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE? 53 (1992).

152. See Statute of Westminster, 1931, 22 Geo. 5, ch. 4, ss. 2, 4.

153. Reference re: Offshore Mineral Rights, [1967] S.C.R. 792, 816.

154. I am grateful to Rosalind Dixon for her help in resolving this point.

155. K.C. WHEARE, FEDERAL GOVERNMENT 237-39 (1946).

binding," and convention as "some method of behaving which is regarded as binding, though it lacks the actual force of law," Wheare recognizes that both usage and convention "may nullify certain legal powers by making it constitutionally improper to exercise them, and in this way actually restrict in practice the extent of [governmental powers]." <sup>156</sup> As to whether the use of the Canadian powers of disallowance and reservation has declined as a result of usage or convention, Wheare argues it is the former, not convention. <sup>157</sup> Wheare therefore does not interpret the pattern of nonuse as binding, which would be the case were he to have interpreted the pattern of nonuse as a convention, and instead concludes that "no binding rule has been adopted so far which would enable one to say with certainty what limits the Dominion recognizes to its power." <sup>158</sup>

It is worth noting that Wheare made this claim in 1946. <sup>159</sup> At the time, the Canadian powers of disallowance and reservation were weakening but had not yet fallen into desuetude. From the entrenchment of both powers in 1867 through 1896, the Canadian government disallowed 65 provincial laws and reserved 57. From 1896 to 1920, the numbers declined to 31 and 8, respectively. Over the subsequent 26 years until 1946, there were 16 disallowances and 4 reservations, the most recent disallowance occurring in 1943 and the most recent reservation in 1937. <sup>160</sup> Wheare was therefore correct to argue, in 1946, that disallowance and reservation had not yet become so infrequently used that a convention had taken root against their use.

The Canadian Supreme Court confirmed the validity of the disallowance and reservation powers in 1938. In a Reference issued at the request of the Canadian government, the Court unanimously confirmed that both powers were then still operative, <sup>161</sup> bringing clarity to the uncertainty surrounding whether the Canadian government

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156. *Id.* at 238.

157. *Id.*

158. *Id.*

159. In 1938, Eugene Forsey rejected the assumption that the power of disallowance "was fast becoming obsolete." Eugene Forsey, *Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors Since 1867*, 4 CAN. J. ECON. POL. SCI. 47, 47 (1938). No provincial law had been disallowed since 1924 but the Canadian government disallowed three provincial laws in 1937. *Id.*

160. These data on disallowance and reservation are calculated from detailed appendices in GERALD V. LA FOREST, *DISALLOWANCE AND RESERVATION OF PROVINCIAL LEGISLATION* 83-115 (1955). Claude Bélanger reports similar, though not the same, numbers in his own study: 68 disallowances from 1867-1896, 28 from 1897-1920, 16 from 1921-2001; 57 reservations from 1867-96, 9 from 1897-1920, and 4 from 1921-2001. See Claude Bélanger, *The Powers of Disallowance and Reservation in Canadian Federalism, in Studies on the Canadian Constitution and Canadian Federalism* (2001), available at: <http://faculty.marianopolis.edu/c.belanger/QuebecHistory/federal/disallow.htm> (last visited February 26, 2014).

161. Reference re: The Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province, [1938] S.C.R. 71 (Can.) (*hereinafter* *Reference re: Disallowance and Reservation*).

could still exercise them.<sup>162</sup> The reference arose from the province of Alberta's resolutions asking the Canadian government to request an advisory opinion from the Court on the validity of both powers after the Canadian government had exercised its powers of disallowance and reservation against Alberta.<sup>163</sup> One justice's advisory opinion wrote that "there is no room for serious argument" that the powers of disallowance and reservation are no longer valid, if only because the relevant constitutional text entrenching those powers not been repealed.<sup>164</sup> Neither the power of disallowance nor the power of reservation could have been correctly said to have fallen into desuetude at that time.

But today the Canadian powers of disallowance and reservation are politically invalid as a result of constitutional desuetude. Over half a century has elapsed since the most recent uses of disallowance and reservation: disallowance last occurred seventy-one years ago in 1943 and reservation most recently fifty-three years ago in 1961.<sup>165</sup> Both powers remain entrenched in the constitutional text and theoretically useable by the Canadian government. Yet it is unlikely that either power would be revived given their prolonged nonuse and rejection by political actors as well as the evolution of Canadian federalism. This combination of desuetude, history and illegitimacy is strong evidence that a convention now exists against their exercise. The effect of this new convention has been to informally amend the Canadian Constitution such that although both powers appear in the text they are treated as though they had been repealed by formal amendment.

Although courts will not enforce conventions, they will recognize their existence. In the 1938 Reference, the Chief Justice of Canada distinguished between constitutional usage and constitutional law, and suggested that both disallowance and reservation remained valid powers under constitutional law, though not necessarily under norms of constitutional practice.<sup>166</sup> More recently in the 1981 Patriation Reference, the Supreme Court recognized the existence of a convention requiring substantial provincial consent to a federally proposed constitutional amendment that would affect provincial powers.<sup>167</sup> Al-

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162. J.R. Mallory, *The Lieutenant-Governor's Powers: The Reservation of Bill 56*, CAN. J. ECON. & POL. SCI. 518, 521 (1961); W.G. Morrow, *Disallowance*, 3 ALTA. L.Q. 83, 83 (1938-39).

163. J.R. Mallory, *Disallowance and the National Interest: The Alberta Social Credit Legislation of 1937*, CAN. J. ECON. & POL. SCI. 342, 350-52 (1948).

164. *Id.* at 96.

165. Andr  e Lajoie, *Federalism in Canada: Provinces and Minorities—Same Fight*, in CONTEMPORARY CANADIAN FEDERALISM: FOUNDATIONS, TRADITIONS, INSTITUTIONS 163, 167 (Alain-G. Gagnon ed., 2009).

166. See *Reference re: Disallowance and Reservation*, *supra* note 161, at 78.

167. *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 905-06.

though the Court held by a margin of 7-2 that there was no judicially enforceable constitutional law requiring Parliament to secure the agreement of provinces, the Court also held by a margin of 6-3 that there existed a constitutional convention requiring provincial consent.<sup>168</sup> Explaining the conflict between the existence of a convention and its non-enforceability, the Court stressed that the consequences of breaching a convention are political, not legal.<sup>169</sup>

The Court gave its own understanding of a convention's purpose. Writing that a convention ensures "that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period,"<sup>170</sup> the Court nonetheless reiterated that it cannot enforce conventions because "unlike common law rules, conventions are not judge-made rules" and "they are not based on judicial precedents but on precedents established by the institutions of government themselves."<sup>171</sup> But the heart of the reason why courts cannot enforce conventions, according to the Court, is that they are often in tension with the legal rules in the constitutional text and statutory law that Courts are bound to enforce.<sup>172</sup> Therefore when faced with a conflict between the constitutional text and an inconsistent constitutional convention, the Court will be bound to apply the former.

Recognizing but not enforcing the constitutional convention is likely how the Court would approach the matter were a constitutional question raised today on the validity of a constitutional convention against using the Canadian powers of reservation and disallowance. That the Court would not enforce the convention over the constitutional text derives from the nature of courts: "judges simply 'can't' weigh the evidence and judicially determine that a statute has been abrogated by a contrary custom; the facts involved are legislative in nature."<sup>173</sup> The Court could likely instead follow the Jennings three-part test on identifying a convention, as it did in the 1981 Patriation Reference, asking whether there are precedents for the nonuse of the powers, the actors involved believe themselves bound, and whether there is a reason for the rule?<sup>174</sup> All three parts of the test would be answered in the affirmative in support of the

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168. *Id.* at 809, 910-11.

169. *Id.* at 882-83.

170. *Id.* at 880.

171. *Id.*

172. *Id.* at 880-81 ("Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules.").

173. Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 28-29 (1966).

174. See *Reference re: Resolution to Amend the Constitution*, *supra* note 167, at 888.



existence of a constitutional convention against both reservation and disallowance.

History provides clear precedent for the nonuse of reservation and disallowance: it has been roughly seventy and fifty years, respectively, since either has been used. Political actors also appear to see themselves bound by this precedent. A 1980 report from the Senate's Standing Committee on Legal and Constitutional Affairs alludes to the illegitimacy of both powers: "The powers of reservation and disallowance have become obsolete. They are incompatible with a genuine federation."<sup>175</sup> At the most recent use of the either power, in 1961, then-Prime Minister John Diefenbaker criticized the Lieutenant-Governor's action to reserve the provincial bill, stating that he had "exceeded his authority."<sup>176</sup> More recently, in the 1970s, one scholar suggested that the changing economic and political conditions in light of a then-emerging energy crisis could precipitate the use of the disallowance power, specifically against provincial laws on oil and gas,<sup>177</sup> yet the power was not used. In the same year another scholar described the disallowance power as a relic "of another era."<sup>178</sup> Scholars have largely concluded that both powers have fallen into disuse,<sup>179</sup> describing them as "relics of a bygone era,"<sup>180</sup> "essentially defunct,"<sup>181</sup> "most unpopular among the people of Canada,"<sup>182</sup> and as "no longer legitimate."<sup>183</sup>

Judges have expressed similar views on the nonuse of both powers. In 1969, Bora Laskin, then judge of the Ontario Court of Appeal and future Chief Justice of Canada, wrote of the disallowance and

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175. The Standing Senate Committee on Legal and Constitutional Affairs, Report to the Senate of Canada on Certain Aspects of the Canadian Constitution, at 7 (November 1980).

176. RICHARD CONNORS & JOHN M. LAW, FORGING ALBERTA'S CONSTITUTIONAL FRAMEWORK 292 (2005).

177. See L. Wilson, *Disallowance: The Threat to Western Canada*, 39 SASK. L. REV. 180, 159-60, 180-81 (1974-75).

178. See Gérald A. Beaudoin, *La Loi 22: À propos du désaveu, du référé et de l'appel à l'exécutif fédéral*, 5 REV. GEN. 385, 386 (1974) (describing disallowance in French as "d'une autre époque").

179. See, e.g., RONALD I. CHEFFINS & PATRICIA A. JOHNSON, THE REVISED CANADIAN CONSTITUTION: POLITICS AS LAW 120 (1986); RONALD J. CHEFFINS, THE CONSTITUTIONAL PROCESS IN CANADA 11, 29, 82, 86 (1969); NORMAN WARD, DAWSON'S THE GOVERNMENT OF CANADA 225 (6th ed. 1987); Wheare, *supra* note 155, at 18-20; Ronald I. Cheffins & Ronald N. Tucker, *Constitutions, in* THE PROVINCIAL POLITICAL SYSTEMS: COMPARATIVE ESSAYS 257, 259 (David J. Bellamy et al. eds., 1976); see also HOGG, *supra* note 128, at 5-19 (stating that "the provincial case is unimpeachable: the modern development of ideas of judicial review and democratic responsibility has left no room for the exercise of the federal power of disallowance.").

180. JENNIFER SMITH, FEDERALISM 55 (2011).

181. UGO M. AMORETTI & NANCY BERMEO, FEDERALISM AND TERRITORIAL CLEAVAGES 100 (2004).

182. Wheare, *supra* note 155, at 19-21.

183. R. Kent Weaver, *Political Institutions and Canada's Constitutional Crisis, in* THE COLLAPSE OF CANADA? 7, 44-45 (R. Kent Weaver ed., 1992).

reservation powers that they "are dormant if not entirely dead."<sup>184</sup> In the 1981 Patriation Reference, a majority of the Court suggested that the nonuse of reservation and disallowance could mature into a convention against both: "It is conceivable for instance that usage and practice might give birth to conventions in Canada relating to . . . the reservation and disallowance of provincial legislation."<sup>185</sup> In the same Reference, the Court's majority furthermore acknowledged their nonuse, stating that "reservation and disallowance of provincial legislation, although in law still open, have, to all intents and purposes, fallen into disuse."<sup>186</sup>

There are important reasons why both powers have become unused and unusable. The provincial rights movement is prominent among them.<sup>187</sup> In the first thirty years following the adoption of the *Constitution Act, 1867*, the provincial rights movement advocated two principles: provincial autonomy and a formalist reading of the constitution.<sup>188</sup> Pointing to the formal division of powers between the national and provincial governments, the provincial rights movement argued that provinces were separate sovereigns and final arbiters of matters within their own jurisdiction, and that the national government's use of the disallowance power undermined the idea of provincial autonomy.<sup>189</sup> From the provincial perspective, "[i]t made little sense," writes Robert Vipond, "to have exclusive jurisdiction in provincial matters if the boundaries of that jurisdiction could be contracted at the whim of the federal government."<sup>190</sup> If provincial autonomy meant anything, it "meant both independence from the federal government and a fair sharing of power with it. It meant both legal independence and political power."<sup>191</sup> The movement thus rejected disallowance.<sup>192</sup>

The provincial rights movement gained strength just as the judiciary was defining the balance of power between the federal and provincial governments. Canada evolved into a strong federalist state as the Judicial Committee of the Privy Council's interpretation of the *British North America Act, 1867* endorsed the status of provinces less as subordinate to the national government than as more coordinate with it.<sup>193</sup> As Peter Russell writes, the view of provinces as coordi-

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184. BORA LASKIN, *THE BRITISH TRADITION IN CANADIAN LAW* 121-22 (1969).

185. *Reference re: Resolution to Amend the Constitution*, *supra* note 167, at 879.

186. *Id.* at 802.

187. See ROBERT C. VIPOND, *LIBERTY & COMMUNITY: CANADIAN FEDERALISM AND THE FAILURE OF CONSTITUTION* 113-50 (1991).

188. Robert C. Vipond, *Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada*, 18 CAN. J. POL. SCI. 267, 267-68 (1985).

189. *Id.* at 285.

190. *Id.*

191. VIPOND, *supra* note 187, at 151.

192. *Id.* at 286 (internal citation omitted).

193. See Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 L. & CONTEMP. PROBS. 107, 107-08 (1992).

nate not subordinate “became the politically dominant conception of Canadian federalism.”<sup>194</sup> Early cases confirmed in various ways the coordinate status of provinces. One held that provinces possess plenary power within their constitutional jurisdiction and that their laws are not inferior to those passed by the national government.<sup>195</sup> Another held that provinces are independent and autonomous entities enjoying exclusive and supreme powers within their jurisdiction free of control by the national government.<sup>196</sup> Still another held that the national government must respect provincial jurisdiction when legislating to fulfill treaty obligations.<sup>197</sup>

Garth Stevenson offers supporting reasons for the decline of disallowance and reservation. They are supporting insofar as they are derivative of or related to the provincial rights movement. First, explains Stevenson, both powers appeared “increasingly illegitimate and anachronistic” as Canadians grew to see them as an undemocratic exercise of national authority.<sup>198</sup> Judicial decisions on the division of powers between the national and provincial governments gave the provinces good reason to believe that they “should enjoy equal dignity and status with the federal Parliament.”<sup>199</sup> Electoral politics played a part as well: “it was politically hazardous to use disallowance and reservation, especially against the larger provinces whose support was crucial in federal elections.”<sup>200</sup> Fourth, the national government stood to gain little were a province to defy its disallowance or reservation: “[t]here was nothing to prevent the provincial legislature from adopting the same act, or a practically identical one, a second time, thus forcing the federal government or the lieutenant-governor either to admit defeat or to repeat the process, again with no assurance of ultimate success.”<sup>201</sup> Although Stevenson does not predict that the national government will never again use these powers, he concludes that “they have become unpopular and recent federal governments have shown little or no disposition to use them,” and that there is an “almost universal expectation that the powers will never again be exercised.”<sup>202</sup> This fulfills the third requirement of Jennings’ three-part framework—

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194. Peter H. Russell, *Provincial Rights*, in *Essential Readings in Canadian Constitutional Politics* 159, 162 (Christian Leuprecht & Peter H. Russell eds., 2011).

195. *Hodge v. The Queen*, (1883) 9 App. Cas. 117, 132-33.

196. *Liquidators of the Maritime Bank of Canada v. New Brunswick (Receiver-General)*, [1892] A.C. 437, 441-42.

197. *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 326, 353-354.

198. GARTH STEVENSON, *UNFULFILLED UNION* 214 (5th ed. 2009).

199. *Id.*

200. *Id.*

201. *Id.* at 214-15.

202. *Id.* at 215.

that there must be a reason for the nonuse of disallowance and reservation in order for the rule to qualify as a convention.

That a convention now exists against the use of the Canadian powers of disallowance and reservation does not appear today to be a controversial point. Andrew Heard, the leading scholar of constitutional conventions in Canada, writes that there now exists a "widely based consensus" against using either power.<sup>203</sup> He concludes that "clear and broadly accepted conventions have arisen to nullify the powers of disallowance and reservation,"<sup>204</sup> and that the Supreme Court would likely agree were it faced with the question: "with its recent willingness to deal with conventional questions touching on 'constitutionality and legitimacy,' the Supreme Court of Canada would now in all likelihood state that the powers of reservation and disallowance have been neutered by convention."<sup>205</sup> To borrow from Alain Cairns, the erosion of both powers is the result of "concrete Canadian political facts" that now form part of Canadian political culture.<sup>206</sup> The content of the powers have all but vanished; all that remains is their textual entrenchment.

The Canadian judiciary has filled the void left by the obsolescence of the disallowance and reservation powers. Today, instead of exercising its unilateral power to disallow or reserve provincial legislation, the national government turns to the courts to undo or review provincial legislation, by either raising a constitutional challenge or requesting an advisory opinion from the Court. The disallowance power, more specifically, has effectively been replaced by this statutory reference procedure,<sup>207</sup> which authorizes the national government to request an advisory opinion on "the constitutionality or interpretation of any federal or provincial legislation."<sup>208</sup> A modern study of the reference procedure has shown that as much as eighty-four percent of all references concerned the distribution of powers between the national and provincial governments,<sup>209</sup> which would have been the kind of conflict that led the federal government to disallow a provincial law. We should not overestimate this study, however, because it cannot prove that the national government in

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203. ANDREW HEARD, *CANADIAN CONSTITUTIONAL CONVENTIONS: THE MARRIAGE OF LAW AND POLITICS* 103 (1991).

204. *Id.* at 105.

205. *Id.*

206. Alan C. Cairns, *The Judicial Committee and its Critics*, 4 CAN. J. POL. SCI. 301, 322 (1971).

207. BARRY STRAYER, *THE CANADIAN CONSTITUTION AND THE COURTS* 322 (3d ed. 1988).

208. Supreme Court Act, R.S.C. 1985, c. S-26, s.53(1)(b)

209. James L. Huffman & MardiLyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction*, 74 MINN. L. REV. 1251, 1290 n.214 (1990).

any single instance chose the reference procedure over the disallowance power.<sup>210</sup>

The rise of the reference procedure as the functional analogue of the disallowance power mirrors the rise of the judicial role in managing federalism. The federal government's use of the power became seen as illegitimate because "as long as the federal government felt free to use the veto, it could fabricate dubious, indeed phony, jurisdictional claims to extend its own jurisdiction at the expense of legitimate provincial goals."<sup>211</sup> The judiciary, an independent institution in the service of the rule of law, could police the jurisdictional border separating federal and provincial governments less controversially than the federal government could disallow a provincial law, whether or not it was proper use of the disallowance power. As the resolution of jurisdictional disputes moved from the political to the legal sphere, the court's "'legal and judicial function' became dogma, and as dogma changed so practice was gradually altered,"<sup>212</sup> resulting in the delegitimization of the disallowance power. This gradual shift was made more likely because of the availability of a principled judicial alternative to the political use of disallowance.<sup>213</sup>

Today, the political cost of invoking the powers of disallowance or reservation is prohibitive. The national government therefore deems it "better to allow the Courts to decide the constitutionality of provincial statutes, rather, than to have the federal government criticized for the use or misuse of that power."<sup>214</sup> Breaching this convention would entail strictly political sanctions, not legal ones. The Court has relatively recently acknowledged this with respect to the disallowance power when it wrote that its "inappropriate use will always raise grave political issues, issues that the provincial authorities and the citizenry would be quick to raise."<sup>215</sup> The Court refined the point in closing: "In a word, protection against abuse of these draconian powers is left to the inchoate but very real and effective political forces that undergird federalism."<sup>216</sup> These constraints, though not

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210. Frederick Morton reports that the Mulroney government rejected the advice of some Members of Parliament to exercise the disallowance power in response to the Quebec government's law on French-only signage because he "did not consider disallowance a viable option." F.L. MORTON, *LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA* 424 n.2 (3d ed. 2002).

211. Robert C. Vipond, *Alternative Past: Legal Liberalism and the Demise of the Disallowance Power*, 39 U.N.B.L.J. 126, 138 (1990).

212. *Id.* at 147.

213. *Id.*

214. CHRISTOPHER EDWARD TAUCAR, *CANADIAN FEDERALISM AND QUEBEC SOVEREIGNTY* 139 (2002). The availability of the reference procedure responds to Paul Weiler's concern about the risk of provincial governments violating the human rights of provincial minorities. See Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REFORM 51, 86 n.107 (1984).

215. Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327, 372 (La Forest J.).

216. *Id.*

constitutionally-entrenched, have proven effective to bind the federal government to the convention against using either the disallowance or reservation powers.

*B. Pre-Desuetudinal Powers: Federal and Provincial Legislative Override*

Section 33 of the *Constitution Act, 1982* is equally relevant to our discussion of constitutional desuetude. Known as the “Notwithstanding Clause,” section 33 authorizes the Canadian Parliament or a provincial legislature to override the judicial interpretation of certain rights.<sup>217</sup> Where Parliament or a provincial legislature adopts a law in breach of the *Charter of Rights and Freedoms*, it may insulate that law against judicial review by inserting within it a declaration that the law operates “notwithstanding” its violation of the Charter.<sup>218</sup> The declaration of validity lasts no longer than five years,<sup>219</sup> though it may be adopted again indefinitely for five-year terms.<sup>220</sup> Parliament or a provincial legislature may deploy the legislative override either after a court has invalidated a law as violative of the Charter or preemptively prior to a judicial opinion on a law’s constitutionality.<sup>221</sup> This legislative override confers the same powers upon both the federal Parliament and provincial legislatures. We can therefore interpret the *Charter* as creating two powers of legislative override: federal and provincial.

1. The Declining Use of the Legislative Override

The use of legislative override is declining across Canada for several reasons. First, as Jeffrey Goldworthy argues, the history of its use is itself a reason for its declining relevance: Quebec’s use of the power as a protest to the adoption of the *Charter* may have created a negative association between the power and *Charter* violations, thereby making the power “virtually unuseable before it had been given a ‘fair go’.”<sup>222</sup> Second, the wording of the power is problematic

217. *Charter*, s.33.

218. This legislative override applies only to Sections 2 and 7-15 of the Charter. *Id.* at subsec. 33(1).

219. *Id.* at subsec. 33(3).

220. *Id.* at subsecs. 33(3)-(5).

221. Janet L. Hiebert, *Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding*, in *CONTESTED CONSTITUTIONALISM: REFLECTIONS ON THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 109, 118 (James B. Kelly ed., 2009).

222. JEFFREY GOLDSWORTHY, *PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES* 221 (2010). Quebec’s use of the legislative override in response to the Supreme Court’s decision in *Ford v. Quebec* was contentious as well. It is argued to have “severely undermined the political legitimacy of section 33.” CHRISTOPHER P. MANFREDI, *JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM* 187 (2d ed. 2001). Following the negative reaction to the decision, issued on December 15, 1988, the Quebec government quickly invoked the override within a

because it reads like a “power to override the *Charter* itself, rather than disputed judicial interpretation of the *Charter*.”<sup>223</sup> That the design of the legislative power expresses trust for the political process<sup>224</sup> weakens the public legitimacy of the legislative override because Canadians hold politicians and the political process in low regard but hold in high regard the *Charter* and the judges who interpret it.<sup>225</sup> Third, political actors at the highest levels have condemned the legislative override.<sup>226</sup>

Scholars have commonly argued that the legislative override has fallen into desuetude.<sup>227</sup> Some have suggested that there may be a convention against its use.<sup>228</sup> Still others have observed how rarely the override has been used and how reluctant legislatures have been to invoke it.<sup>229</sup> Peter Hogg and Allison Bushell have argued that the legislative override “has become relatively unimportant, because of

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week on December 21. See PATRICK JAMES, CONSTITUTIONAL POLITICS IN CANADA AFTER THE CHARTER: LIBERALISM, COMMUNITARIANISM, AND SYSTEMISM 20 (2010).

223. *Id.* at 219.

224. PATRICK MONAHAN, POLITICS AND THE CONSTITUTION 119 (1987).

225. NELSON WISEMAN, IN SEARCH OF CANADIAN POLITICAL CULTURE 72-73 (2011).

226. See, e.g., EDWARD MCWHINNEY, CANADA AND THE CONSTITUTION 1979-1982: PATRIATION AND THE CHARTER OF RIGHTS 97 (1982); House of Commons, Debates, Apr. 6, 1989, at 153 (Brian Mulroney); *Martin Wraps Campaign in Constitutional Pledge*, CBC News, Jan. 10, 2006, available at: <http://www.cbc.ca/news/canada/martin-wraps-campaign-in-constitutional-pledge-1.609744> (last visited February 26, 2014).

227. See, e.g., IAN CRAM, CONTESTED WORDS: LEGAL RESTRICTIONS ON FREEDOM OF SPEECH IN LIBERAL DEMOCRACIES 35 (2006); W.J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW 130 (2007); Tom Flanagan, *Canada's Three Constitutions: Protecting, Overturning, and Reversing the Status Quo*, in MYTH OF THE SACRED: THE CHARTER, THE COURTS, AND THE POLITICS OF THE CONSTITUTION OF CANADA 126, 135 (Patrick James et al. eds., 2002); Grant Huscroft & Paul Rishworth, *You Say You Want a Revolution: Bills of Rights in the Age of Human Rights*, in A SIMPLE COMMON LAWYER: ESSAYS IN HONOUR OF MICHAEL TAGGART 123, 145 (David Dyzenhaus et al. eds., 2009); James Allan, *Critical Notice: An Unashamed Majoritarian*, 27 DALHOUSIE L.J. 537, 547 (2004); Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 832-33 (2003); Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 450 (2002). Calvin Massey represents one of the exceptions to the rule. He argues that the provincial legislative override is fully useable but that federal legislative override is not. See Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1272.

228. See, e.g., Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235, 253 n.92 (2009); Adam M. Dodek, *A Tale of Two Maps: The Limits of Universalism in Comparative Judicial Review*, 47 OSGOODE HALL L.J. 287, 304 n.70 (2009); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 726 (2001).

229. See, e.g., RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 10 (2006); W.A. BOGART, COURTS AND COUNTRY: THE LIMITS OF LITIGATION AND THE SOCIAL AND POLITICAL LIFE OF CANADA 311 (1994); Barbara Billingsley, *Section 33: The Charter's Sleeping Giant*, 21 WINDSOR Y.B. ACCESS JUST. 331, 337 (2002); Julie Debeljak, *Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights*, 26 MELB. U. L. REV. 285, 322 (2002); R. Roy McMurtry, *The Creation of an Entrenched Charter of rights—A Personal Memoir*, 31 QUEEN'S L.J. 456, 478 (2006); Kent Roach, *A Dialogue about*

the development of a political climate of resistance to its use.”<sup>230</sup> Janet Hiebert has observed that many regard the power as “constitutionally illegitimate,”<sup>231</sup> Grant Huscroft has described it as “unusable,”<sup>232</sup> Christopher Manfredi and James Kelly have pointed to what they see as its “progressive delegitimization,”<sup>233</sup> Goldsworthy argues that it is in desuetude,<sup>234</sup> and Howard Leeson refers to the legislative override as a “paper tiger” no more relevant than the Canadian powers of disallowance and reservation.<sup>235</sup>

## 2. The Validity of the Legislative Override

But neither the federal nor the provincial override has yet fallen into desuetude. The legislative override has actually been used quite often.<sup>236</sup> The provincial legislative override has been used roughly twenty times by four separate legislatures: Alberta, Quebec, Saskatchewan and Yukon.<sup>237</sup> Its use has also been seriously contemplated on at least three significant occasions, all by Alberta, the first in 1983 with respect to the right to strike,<sup>238</sup> the second in 1998 with respect to a sterilization bill, which the province ultimately withdrew,<sup>239</sup> and the third in response to the Supreme Court’s refer-

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*Principle and Principled Dialogue: Justice Iacobucci’s Substantive Approach to Dialogue*, 57 U. TORONTO L.J. 449, 465 (2007).

230. Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between the Courts and the Legislatures*, 35 OSGOODE HALL L.J. 75, 83 (1997).

231. JANET L. HIEBERT, *LIMITING RIGHTS: THE DILEMMA OF JUDICIAL REVIEW* 139 (1996).

232. Grant Huscroft, *Reconciling Duty and Discretion: The Attorney General in the Charter Era*, 34 QUEEN’S L.J. 773, 782 (2009).

233. Christopher P. Manfredi & James B. Kelly, *Misrepresenting the Supreme Court’s Record? A Comment on Sujit Choudhry and Claire E. Hunter, “Measuring Judicial Activism on the Supreme Court of Canada”*, 49 MCGILL L.J. 741, 763 (2004).

234. Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKE FOREST L. REV. 451, 466-70 (2003).

235. Howard Leeson, *Section 33, the Notwithstanding Clause: A Paper Tiger?*, 6 CHOICES 1, 20 (IRRP June 2000), available at: <http://archive.irpp.org/choices/archive/vol6no4.pdf> (last visited February 26, 2014).

236. There have also been several instances of what has been called “notwithstanding-by-stealth,” where judicial decisions have been effectively legislatively overridden without the formal use of the legislative override. See James B. Kelly & Matthew A. Hennigar, *The Canadian Charter of Rights and the Minister of Justice: Weak-Form Review Within a Constitutional Charter of Rights*, 10 INT’L J. CONST. L. 35, 39 (2012).

237. In addition to Quebec’s omnibus use of the legislative override from 1982 to 1985, Alberta, Saskatchewan and Yukon have each used the override once and Quebec has used it fifteen times. See Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 CAN. PUB. ADMIN. 255, 256-57 (2001) (detailing uses of the legislative override); see also Tsvi Kahana, *Legalism, Anxiety and Legislative Constitutionalism*, 31 QUEEN’S L.J. 536, 551 n.51 (2006) (updating his earlier study of the legislative override).

238. Peter Lougheed, *Why a Notwithstanding Clause?*, POINTS OF VIEW, No. 6, at 9-10 (1998).

239. A. Naomi Nind, *Solving an “Appalling” Problem: Social Reformers and the Campaign for the Alberta Sexual Sterilization Act, 1928*, 38 ALBERTA L. REV. 536, 562 (2000).



ence on marriage in 2005.<sup>240</sup> That the provincial override is desuetudinal is a difficult argument to make, given not only that the legislative override was introduced only recently in 1982, but also that many see merit in the concept of the override and believe it should be used more frequently.<sup>241</sup> Indeed, as the Chief Justice of Canada has observed, the legislative override is legitimately available to political actors.<sup>242</sup> It is more than a mere textual constraint on the judiciary; its entrenchment is known to judges, who interpret the Constitution under threat of the its use and cognizant of the possibility of reversal.<sup>243</sup>

### 3. The Future of the Legislative Override

In contrast to the provincial override, the federal override has not once been used in over thirty years of entrenchment. It is therefore at greater risk of constitutional desuetude than the provincial override. Should the federal legislative override remain unused for another generation, its nonuse may develop into a constitutional convention against its use. As Heard posits, the reluctance to invoke the power may ultimately achieve a binding quality.<sup>244</sup> This would suggest an inverse relationship between its use and public disapproval: "just as conventions develop through regular practice evolving into prescriptive custom, the less s.33 is used, the more its use is likely to be disapproved of."<sup>245</sup> It will take another generation before the duration of the nonuse of the federal legislative override approaches the half-century of nonuse that now characterizes the Canadian power of reservation.

240. *Alberta May Invoke Notwithstanding Clause Over Same-Sex Marriage*, CBC News, July 27, 2005, available at: <http://www.cbc.ca/news/canada/alberta-may-invoke-notwithstanding-clause-over-same-sex-marriage-1.528949> (last visited February 26, 2014).

241. See, e.g., Sanjeev Anand, *The Truth About Canadian Judicial Activism*, 15 Const. Forum 87, 94-95 (2006); Allan E. Blakeney, *The Notwithstanding Clause, the Charter, and Canada's Patriated Constitution: What I Thought We Were Doing*, 19 CONST. FORUM 1, 5, (2010); Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MODERN L. REV. 7, 27 (2006); F.L. Morton, *The Political Impact of the Canadian Charter of Rights and Freedoms*, 20 Can. J. Pol. Sci. 31, 54-55 (1987); Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 158 (1993); Peter H. Russell, *The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy*, POLICY OPTIONS 65, 66-67 (February 2007); Peter H. Russell, *Standing Up for Notwithstanding*, 29 Alta. L. Rev. 293, 295-302 (1991); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 286 (1995); see also Scott Reid, *Penumbra for the People: Placing Judicial Supremacy under Popular Control*, in *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* 186, 186-213 (Anthony A. Peacock ed., 1996) (arguing that the override should be used only if approved by referendum).

242. Beverley McLachlin, *Charter Myths*, 33 U.B.C. L. REV. 23, 29 (1999).

243. Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 Int'l J. Const. L. 167, 180 (2010).

244. Heard, *supra* note 203, at 147.

245. Goldsworthy, *supra* note 222, at 218.

Yet we cannot be certain that either power of legislative override, the federal or provincial, will ever fall into desuetude. Although current and former judges have acknowledged that uses of the legislative override have been infrequent and unpopular,<sup>246</sup> its future remains unsettled. It is, in the words of Barbara Billingsly, “a sleeping giant” that could either be reawakened or left to languish, depending on its proposed uses and the public response to them.<sup>247</sup> Perhaps the current state of both powers reflects the Canadian political climate only as it is today, and not as it is fated to remain.<sup>248</sup> Both or either powers could lose legitimacy, and over time create a convention against their use approximating a formal amendment entrenching their repeal. We cannot quite yet claim that a constitutional convention prohibits their use, nor can we yet project that one or both will fall into desuetude and that the rule of recognition will therefore change their current binding quality. But we can state today that the federal override is closer to constitutional desuetude than the provincial override.

#### IV. INFORMAL AMENDMENT AND CONSTITUTIONAL DESUETUDE

Drawing from our study of constitutional desuetude in Canada, we may construct a preliminary framework for identifying constitutional desuetude elsewhere. I begin this Part by positing seven criteria to identify constitutional desuetude. I then distinguish constitutional desuetude from other phenomena of constitutional change. Finally, I explore the costs of constitutional desuetude, specifically its legal and political consequences.

##### A. *Identifying Constitutional Desuetude*

Informal amendment raises a difficulty for constitutional interpretation and enforcement. When the constitution is amended informally without recourse to formal amendment rules, the product of the amendment is not memorialized in the constitutional text. How, then, can we know whether the constitution has in fact been amended?<sup>249</sup> Stephen Griffin offers a five-part roadmap to identify

246. See, e.g., *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 141 (Rothstein & Charron, J., concurring); Christopher P. Manfredi, *Strategic Behaviour and the Canadian Charter of Rights and Freedoms*, in MYTH OF THE SACRED: THE CHARTER, THE COURTS, AND THE POLITICS OF THE CONSTITUTION OF CANADA 147, 164 (Patrick James et al. eds., 2002); Bertha Wilson, *The Making of a Constitution*, 71 *Judicature* 334, 336 (1988).

247. Barbara Billingsly, *Section 33: The Charter's Sleeping Giant*, 21 WINDSOR Y.B. ACCESS JUST. 331, 346 (2002).

248. See Peter W. Hogg et al., *A Reply on "Charter Dialogue Revisited"*, 45 OS-GOODE HALL L.J. 193, 201 (2007).

249. Identifying the substance of an informal amendment is not a problem of authority but rather of execution. Informal amendments are as authoritative as formal

informal constitutional amendment.<sup>250</sup> First, the change must work a reordering of constitutional rules.<sup>251</sup> Second, that change must set the standard for the future conduct of political actors,<sup>252</sup> and thereby, third, create a norm or norms functionally equivalent to a formal constitutional rule.<sup>253</sup> Fourth, the change must have been driven self-consciously by political actors.<sup>254</sup> And, fifth, the change must permeate the conventional constitutional understanding of elites.<sup>255</sup> I interpret Griffin as establishing five criteria for identifying informal amendment: constitutional reordering, standard-setting, norm-generation, self-consciousness, and permeation.

### 1. A Framework for Constitutional Desuetude

Griffin's five criteria for informal amendment may be refined with two additional ones specific to constitutional desuetude. One is perhaps implicit in his criteria of informal amendment and the other must be emphasized as a unique property of constitutional desuetude. The first additional criterion is repudiation. When an informal amendment reorders constitutional rules, one constitutional rule is implicitly replaced by another. The effect of replacing one rule is to repudiate the original rule and to sanction the new one. Repudiation is definitional in informal amendment by constitutional desuetude; there can be no constitutional desuetude without the repudiation of an entrenched provision. The strength and source of the repudiation are relevant but are context-dependent. Bipartisan repudiation across generations may not always be necessary, though it would make repudiation unmistakable. The second additional criterion is continuing entrenchment. It is a unique feature of constitutional desuetude. Constitutional desuetude requires that the desuetudinal provision remain entrenched in the constitutional text despite its obsolescence.

We may therefore posit seven criteria to identify informal amendment by constitutional desuetude. First, a constitutional reordering occurs informally as a result of the sustained nonuse of an entrenched constitutional provision. Second, that constitutional pro-

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amendments but they are harder to identify. See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 210 n.158 (2008).

250. Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 49-66 (Martin Loughlin & Neil Walker eds., 2007). Griffin categorizes constitutional change as either legal/formal or non-legal/informal. For Griffin, legal changes include formal amendment and judicial interpretation whereas non-legal changes occur through the political process. *Id.* at 52.

251. *Id.* at 57.

252. *Id.* at 58.

253. *Id.* at 60.

254. *Id.* at 60.

255. *Id.* at 61.

vision is expressly repudiated by political actors. Third, a new constitutional rule replaces the repudiated rule and thereafter sets the standard for future conduct by political actors. Fourth, the standard is seen as norm-generative; it exercises a binding effect that approximates a formal constitutional rule even though the new rule has developed informally. Fifth, political actors self-consciously follow the new standard, believing themselves bound by it and recognizing that their predecessors intentionally engineered that constitutional reordering. Sixth, the new constitutional rule permeates the elite conventional understanding of the constitution. Finally, despite the affirmation of a new rule that is contrary to the repudiated rule, the repudiated rule remains textually entrenched.

Applying these seven criteria to the British and Canadian powers of disallowance and reservation as well as to the federal and provincial legislative override suggests that the former are examples of constitutional desuetude and the latter are not. The new rule extinguishing the British powers of reservation and disallowance now forms part of the conventional understanding of the Constitution, despite the enduring textual entrenchment of both powers. The same is true for the Canadian powers of disallowance and reservation. The new non-textual rule supporting the unbroken nonuse of both powers now enjoys as much political legitimacy as a formal constitutional rule despite its informal origins and unwritten form. In contrast, the conventional understanding of the Constitution for now accepts both the federal and provincial legislative override as part of both the actual and textual Constitution, and as legitimately within the power of political actors. However with continued nonuse the federal legislative override may fall into desuetude sooner than the provincial legislative override, but it has not yet reached that point.

## 2. Distinguishing Dormancy from Desuetude

These criteria also equip us to distinguish dormant prerogative powers from desuetudinal constitutional powers. Consider the 1975 prime ministerial dismissal in Australia, a series of episodes culminating with the Governor General dismissing the prime minister, dissolving both Houses of Parliament, and setting new elections that put the former opposition into power.<sup>256</sup> What prompted these events was the combination of the government's political scandal involving a loan program, declining national economic performance and forecasts, a string of resignations by Cabinet ministers, and the government's inability to pass a supply bill in the face of obstruction

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256. For an contemporaneous account of the dismissal, see Christopher Sweeney, *Australia in turmoil as Whitlam is fired*, *The Manchester Guardian*, Nov. 12, 1975, available at: <http://www.theguardian.com/world/1975/nov/12/australia> (last visited February 26, 2014).

by the opposition in the Senate.<sup>257</sup> The opposition called for Prime Minister Gough Whitlam to resign and thereby trigger new elections, but he refused.<sup>258</sup> With no foreseeable agreement on a solution between the government and the opposition, and the impasse on a supply bill running well into several weeks, Governor General Sir John Kerr ultimately broke the deadlock: he dismissed the prime minister and the Cabinet, dissolved both the Lower House and the Senate, and called new elections.<sup>259</sup> The former opposition won majorities in both the Lower House and Senate, and earned the largest majority in the Lower House since the adoption of the constitution.<sup>260</sup>

The Australian Governor General had never before dismissed a prime minister. In dismissing the prime minister, the Governor General invoked his reserve power under Section 64 of the Australian Constitution.<sup>261</sup> The power of dismissal is implied from the Constitution's authorization that "the Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish," and that "such officers shall hold office during the pleasure of the Governor-General."<sup>262</sup> The Governor General's dismissal power also derives from a related provision stating that "there shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure."<sup>263</sup> There is therefore a textual basis for the dismissal power.

The 1975 dismissal clarifies what qualifies as desuetudinal. For two reasons, the Governor General's power of dismissal had not at the time been amended by constitutional desuetude. First, although the power of dismissal had remained unused for significant period of uninterrupted time, it had not been expressly repudiated by political actors prior to the dismissal. Indeed, at the time, the debate was about the wisdom, not the constitutionality, of the Governor General's actions.<sup>264</sup> Second, the Governor General's power of dismissal is a reserve power possessed as a matter of law and exercisable by discretion.<sup>265</sup> The exercise of reserve powers is by definition legal and

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257. P.H. Lane, *An Introduction to the Australian Constitutions* 72-74 (6th ed. 1994).

258. *Id.* at 76.

259. *Id.* at 77-78.

260. *Id.* at 80.

261. *Id.* at 77.

262. AUSTRALIA CONST., ch. II, § 64 (1900).

263. *Id.* at § 62.

264. Paul Kelly, *The Dismissal and Australian Democracy*, in *POWER, PARLIAMENT AND THE PEOPLE* 126, 128 (Michael Cooper & George Williams eds., 1997).

265. Harry Gibbs, *The Dismissal and the Constitution*, in *POWER, PARLIAMENT AND THE PEOPLE* 146, 151 (Michael Cooper & George Williams eds., 1997).

rare. As Dicey explains, reserve powers may lawfully be exercised without statutory authorization because they fall within the discretionary authority of the monarch.<sup>266</sup> The exercise of reserve powers is also rare. These powers lie dormant for significant durations, to be invoked only when the exercising authority deems it appropriate, which in the case of dismissal is unlikely to be often.<sup>267</sup> The Governor General's exercise of the dismissal power was unopposed by a contrary established convention and unusual, given its nonuse since the adoption of the Constitution in 1900.

### 3. The Political Question Doctrine and Desuetude

In the United States, the Guarantee Clause could be a candidate for constitutional desuetude. Arthur Bonfield has argued that the Guarantee Clause—which states that “the United States shall guarantee to every state in this union a republican form of government . . .”<sup>268</sup>—has fallen into nonuse.<sup>269</sup> Bonfield describes the Clause as “long dormant,”<sup>270</sup> and demonstrates that the Supreme Court has since 1912 “consistently refused to entertain on the merits *any* suit seeking to enforce the guarantee clause.”<sup>271</sup> The Court, argues Bonfield, has used the Fourteenth Amendment to achieve the Guarantee Clause's objectives, rather than using the Clause itself. Bonfield suggests the Clause could better achieve its own objectives<sup>272</sup> and laments that it has been “discarded . . . as judicially unenforceable.”<sup>273</sup> Bonfield therefore calls for “a rigorous and expansive enforcement” of the Guarantee Clause, and urges the Court to “resurrect” it.<sup>274</sup>

But the Guarantee Clause it is not in fact obsolete. It still holds meaning despite having “been effectively rendered a nullity by judicial interpretation.”<sup>275</sup> The reason why the Clause remains applicable is that Congress is authorized to interpret and enforce it. As the Court stated, “under this article of the Constitution it rests

266. DICEY, *supra* note 103, at 281, 289.

267. *Id.* at 287-89.

268. U.S. CONST., art. IV, § 4.

269. Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 557 (1962).

270. *Id.* at 513.

271. *Id.* at 556 (emphasis in original). The Supreme Court established this rule in 1849. See *Luther v. Borden*, 48 U.S. 1, 42 (1849). It was reaffirmed in 1962. See *Baker v. Carr*, 369 U.S. 186, 223-29 (1962). Today the Guarantee Clause “has virtually been read out of existence as raising only political questions inappropriate for judicial resolution, while the implicit federal power to secure republican government has, for the most part, lain unused.” Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1470-71 (2012).

272. Bonfield, *supra* note 269, at 557-58.

273. *Id.* at 557.

274. *Id.* at 571.

275. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 850 (1994).

with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.”<sup>276</sup> The Court has ruled that Congress is the authoritative interpreter and enforcer of the Guarantee Clause, stating that “the right to decide is placed there, and not in the courts.”<sup>277</sup> Although the Guarantee Clause raises non-justiciable political questions, it is still binding and enforceable.

Constitutional desuetude cannot occur from the transfer of enforcement responsibility from the judiciary to the legislature since the non-justiciable constitutional text retains its meaning and remains enforceable. The locus of authority has changed, here from the judiciary to the legislature, but the binding force of the text remains unchanged. The Guarantee Clause therefore fails most of the criteria for identifying constitutional desuetude: in the absence of a new norm-generative standard exercising binding effect on political actors, there has been no constitutional reordering as a result of sustained nonuse, political actors have not self-consciously followed a new rule after having repudiated the Guarantee Clause, there has not been a new rule to replace the Guarantee Clause, and the elite conventional understanding of the constitution remains unchanged insofar as the rule has long been that the Guarantee Clause is non-justiciable but still enforceable by Congress. The Guarantee Clause is therefore not a good example of desuetude despite its non-enforcement by courts.

#### 4. Superseding Amendments and Constitutional Battlegrounds

We must also distinguish constitutional desuetude from formal amendments that supersede an existing constitutional provision yet leave that superseded provision textually entrenched. The practice of adding formal amendments to the constitutional text but keeping the existing text unaltered is a peculiar feature of the United States Constitution.<sup>278</sup> In contrast to modern constitutions that interweave new formal amendments into the existing text, the United States Constitution remains unchanged as formal amendments are appended chronologically to it.<sup>279</sup> For example, although Eighteenth Amendment remains textually entrenched, it has been repealed by the

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276. *Luther*, *supra* note 271, at 42.

277. *Id.*

278. Akhil Amar interprets this phenomenon as an effort to both preserve the past and track democratic progress. Akhil Reed Amar, *Architexture*, 77 *IND. L.J.* 671, 685 (2002).

279. Mehrdad Payandeh, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 *BYU J. PUB. L.* 87, 88 (2011).

Twenty-First Amendment,<sup>280</sup> just as the original structure of national executive elections remains textually entrenched though it has been rendered obsolete by the Twelfth Amendment, which creates a new structure for presidential and vice-presidential elections.<sup>281</sup> Neither is an example of constitutional desuetude. They resulted, respectively, from successful efforts to formally amend the Eighteenth Amendment and the Article II national executive election system.

One additional counterexample merits a brief discussion: the Declaration of War Clause. The Clause states that "The Congress shall have the Power . . . To declare War . . ."<sup>282</sup> Since 1787, Congress has declared war on eleven occasions,<sup>283</sup> yet the United States has been involved in over 200 instances of armed conflict.<sup>284</sup> Congress last issued a formal declaration of war pursuant to this power during World War II.<sup>285</sup> Given that Congress has not invoked the Declaration of War Clause for over seven decades, one could argue that the Declaration of War Clause has fallen into desuetude. However, the Clause is not desuetudinal for at least three reasons. First, that political actors and observers continue to claim that the United States should not commit itself to armed conflict without obtaining a congressional declaration of war demonstrates that the Clause has yet to be publicly repudiated and is still seen as an expression of legitimate and binding constitutional expectations.<sup>286</sup> Second, although Congress has not issued a declaration of war in over seven decades, the Clause is arguably more than an historical anachronism, argues one scholar, insofar as the equivalent of declarations of war have been made by the president, not by Congress, and usually using a designation other than a "declaration of war."<sup>287</sup> Finally, a congressional authorization for the use of force effectively doubles as a

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280. U.S. CONST. amend. XXI.

281. *Id.* at amend. XII.

282. *Id.* at art. I, § 8, cl. 11.

283. Francis D. Wormuth & Edwin B. Firmage, *To Chain the Dog of War: The War of Power Congress in History and Law* 55 (2d ed. 1989).

284. Donald L. Westerfield, *War Powers: The President, the Congress, and the Question of War* 168 (1996).

285. See Alfred W. Blumrosen & Steven M. Blumrosen, *Restoring the Congressional Duty to Declare War*, 63 Rutgers L. Rev. 407, 460 (2011).

286. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000) (rejecting for lack of standing suit by congresspersons arguing that President Clinton violated Declare War Clause and War Powers Resolution); *Drinnan v. Nixon*, 364 F.Supp. 854, 859-60 (D.Mass. 1973) (holding non-justiciable congressional choice of method to consent to continuation of war); Gene Healy, *The Cult of the Presidency: America's Dangerous Devotion to Executive Power* 271-75 (2009) (urging Congress to make declarations mandatory).

287. See Michael D. Ramsay, *Presidential Declarations of War*, 37 U.C. Davis L. Rev. 321, 335-57 (2003). The concept of "partial declarations of war"—defined as "actions either short of enactment or actions resulting in non-binding expressions of the sense of Congress—has also been used to describe the way in which Congress continues to exercise its war powers. See Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 San Diego L. Rev. 1, 5 (1999).



declaration of war inasmuch as it provides "full congressional authorization to the President prosecute a war."<sup>288</sup> The Clause is therefore not yet obsolete, at least not in the same way that the Canadian powers of reservation and disallowance have fallen into constitutional desuetude.

### B. *The Costs of Constitutional Desuetude*

The susceptibility of written constitutions to constitutional desuetude poses challenges for constitution law and theory. There are real costs involved when a constitutional provision loses its binding force as a result of its sustained nonuse and public repudiation. Constitutional desuetude risks weakening the rule of law by undermining the predictability and stability a constitutional text provides. It also causes difficulties for the judicial function insofar as courts may be put in the position of enforcing a constitutional provision that has no public legitimacy. The phenomenon of constitutional desuetude moreover straddles legitimacy and illegitimacy in constitutional change, on the one hand reflecting the emerging political consensus on a constitutional provision yet on the other effectively repealing a provision without the transparent and deliberative procedures of formal amendment. Additionally, constitutional desuetude complicates what it means to describe a constitution as *written*. A brief word on each of these costs follows below in this Section.

#### 1. Desuetude and Constitutionalism

Constitutional desuetude seems to strike at the foundation of written constitutionalism insofar as it divests the constitutional text of the stability we commonly associate with written constitutions.<sup>289</sup> Constitutional desuetude is accordingly no different from other forms of informal amendment, which defy the strictures of written formal amendment rules. As Michael Dorf writes, the concept of informal amendment is "radically destabilizing" because "the unwritten, and thus uncertain, character of informal amendments robs the Constitu-

288. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2062 (2005).

289. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); *Muller v. Oregon*, 208 U.S. 412, 420 (1908); Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 161 (1997); Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 634 (2009); Brendon Troy Ishikawa, *Toward a More Perfect Union: The Role of Amending Formulae in the United States, Canadian, and German Constitutional Experiences*, 2 U.C. DAVIS J. INT'L L. & POL'Y 267, 267 (1996); David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 908 (2003). The rule of law is of course possible in regimes without a written constitution. The United Kingdom is the definitive illustration. As Dicey wrote, the rule of law is one of the two basic principles of the English Constitution, the other being parliamentary sovereignty. See DICEY, *supra* note 103, at 268-73.

tion of its positivist character.”<sup>290</sup> Where a constitutional provision is amended by constitutional desuetude, the text as written assumes a meaning contrary to what it communicates by its own words. This is a riddle for positivism; although the desuetudinal provision once enjoyed political support sufficient to entrench it in the constitutional text, it later lost that support over time despite remaining entrenched in the text. We are therefore left with a difficult choice: either we respect the constitutional text as written, which commits us to adhering to a non-binding constitutional provision, or we find a way to reconcile our respect for the written constitution with the reality that the constitution does not always mean what it says.

Constitutional desuetude also imposes costs with respect to constitutional interpretation. As the popular, political and legal understandings of the constitutional text change from Time One to Time Two to Time *n*, these social understandings evolve without producing corresponding changes to the text. This is uncontroversial in the common law tradition, particularly as judges interpret and reinterpret precedent, statutes and constitutional provisions. However, constitutional desuetude poses a qualitatively different set of circumstances. The desuetude of a constitutional provision occurs over time, just as in conventional interpretation and reinterpretation. But constitutional desuetude leaves a constitutional provision not only with a new interpretation; it creates a new interpretation that divests the provision of its binding force. Whereas the common law tradition of constitutional interpretation commonly imports new meaning into a constitutional provision, it does not commonly strip its meaning altogether.

## 2. Desuetude and Constitutional Interpretation

That political actors may today see little or no legitimacy in the same constitutional provision that constrained their predecessors illuminates the complex sociological dimensions of constitutional desuetude. The work of the hermeneuticist Hans-Georg Gadamer, who understood interpretation as linking the interpreter to the text and the text to the interpreter, is relevant to understanding evolving constitutional interpretations generally and constitutional desuetude more specifically.<sup>291</sup> Gadamer explains that interpretation is neither subjective nor objective, but the result of an experienced tradition which shapes the interpreter and which the interpreter has in turn shaped. For Gadamer, “the anticipation of meaning that governs our understanding of a text is not an act of subjectivity, but proceeds

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290. Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1780 (1997).

291. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 261 (Garrett Barden & John Cumming eds., 1985).

from the communality that binds us to the tradition."<sup>292</sup> And this tradition "is not simply a precondition into which we come, but we produce it ourselves, inasmuch as we understand, participation in the evolution of tradition and hence further determine it ourselves."<sup>293</sup> This dialogical relationship among text, interpreter, tradition, the lived moment and the future complicates the task of finding a point of reference for the "true" or "correct" interpretation precisely because the objective of interpretation is not discovery but rather experience.<sup>294</sup> Though Gadamer does not tell us how to balance the costs and benefits of constitutional desuetude, he offers the tools to begin our inquiry.<sup>295</sup>

The matter of interpretation relates to the judicial role in constitutional desuetude. Where a constitutional provision falls into desuetude, there are two options: first, the court could enforce the constitutional text as written and refuse to recognize desuetude as is generally the case in common law jurisdictions; or alternatively, the court could recognize desuetude and declare the desuetudinal provision invalid. Both cases place the court in a precarious position. In the former, the court would enforce a constitutional provision that has been repudiated by political actors and that the constitutional consensus now rejects as binding. In the latter, the court would take the extraordinary action of voiding a constitutional provision that remains entrenched in the constitutional text. Neither is optimal. The first may come at the cost of the court's public standing. The alternative would create two classes of constitutional provisions—one entrenched and valid, and the other entrenched yet invalid—unless the court created a doctrine of constitutional severability pursuant to which it was authorized to excise desuetudinal provisions from the constitutional text. Constitutional severability would assuage the problem raised by an entrenched yet invalid provision, but it would raise other problems, namely the procedural legitimacy of creating the equivalent of a formal amendment via informal judicial procedures.<sup>296</sup>

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292. *Id.*

293. *Id.*

294. *Id.* at 104-08, 150.

295. For more on Gadamer, see William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 614-24 (1990); Gary C. Leedes, *An Acceptable Meaning of the Constitution*, 61 WASH. U. L. Q. 1003, 1006-12 (1984); Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDISC. L.J. 491, 499-514 (1998); Frank S. Ravitch, *Struggling with Text and Context: A Hermeneutic Approach to Interpreting and Realizing Law School Missions*, 74 ST. JOHN'S L. REV. 731, 734-41 (2000).

296. I am grateful to Catharine Wells for suggesting this connection to Gadamer.

### 3. Desuetude and Democratic Legitimacy

The question whether courts should enforce constitutional desuetude also touches on the expressive function of law. Constitutional provisions may sometimes be intended to express a societal or political aspiration, rather than actually to constrain or compel governmental or private action.<sup>297</sup> For example, as Cass Sunstein notes, a constitutional community might insist on entrenching an antidiscrimination norm “for expressive reasons even if it does not know whether the law actually helps members of minority groups.”<sup>298</sup> Non-rights provisions may also have an expressive function: Elizabeth Anderson and Rick Pildes have illustrated how expressivism helps explain the Supreme Court’s judgments in rights-based litigation involving the Equal Protection and Establishment Clauses, as well as structural litigation implicating the Dormant Commerce Clause and federalism more generally.<sup>299</sup> We can therefore attribute an expressive function to all types of constitutional provisions, not only morals legislation, most notably in the criminal law,<sup>300</sup> whose value sometimes lies less in its actual enforcement than the communal values it expresses.<sup>301</sup> That constitutional provisions may serve an expressive function should give judges pause before they sever a desuetudinal provision or render it null by interpretation without the legitimacy of participatory and transparent procedures that allow public input.

We should therefore probe the democratic legitimacy of constitutional desuetude as a form of constitutional change. Constitutional desuetude is susceptible to criticisms of its illegitimacy yet it may also be in some ways the most legitimate form of constitutional change. On the one hand, constitutional desuetude suffers from the same shortcomings that characterize other forms of informal amendment, particularly informal amendment by judicial interpretation: it effectively amends the constitution without reflecting the broad and deep consensus that formal amendment rules require political actors to reach via transparent and deliberative procedures.<sup>302</sup> On the other hand, constitutional desuetude happens only when political actors choose deliberately against applying or invoking a constitutional pro-

297. There may also be expressive reasons for repealing obsolete constitutional provisions, for instance the racist House apportionment in the Australian Constitution, see AUSTRALIA CONST., ch. I, pt. III, § 25 (1900), and the Three-Fifths Clause in the United States Constitution. See U.S. CONST., art. I, § 2, cl. 3 (1789).

298. Cass R. Sunstein, *On the Expressive Function of Law*, 5 E. EUR. CONST. REV. 66, 67 (1996).

299. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531-64 (2000).

300. See THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 160 (1935).

301. Erik Encarnacion, *Desuetude-Based Severability: A New Approach to Old Morals Legislation*, 39 COLUM. J.L. & SOC. PROBS. 149, 168 (2005).

302. See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1737-38 (2010).

vision *because* the public and political reality has hardened into a consensus. Constitutional desuetude is the result of the calculation by political actors that the costs of applying or invoking a desuetudinal constitutional provision are too high, and that public and political opinion would stand overwhelmingly against them were they to defy the consensus. This produces an uncomfortable balance: what constitutional desuetude lacks in procedural legitimacy it compensates with political legitimacy.

Finally, constitutional desuetude complicates our understanding of written constitutions. Constitutions are properly described as *written* when they meet four criteria: (1) their core principles are codified and (2) form the basis for all existing and future subsidiary principles; and (3) their text is binding and (4) specially entrenched against ordinary legislative repeal.<sup>303</sup> Complete codification is an illusory aspiration insofar as all constitutional regimes rely to some material degree on unwritten conventions.<sup>304</sup> There is an important difference, however, between unwritten conventions and the phenomenon of constitutional desuetude: unwritten conventions are likely to be continuous with the text whereas provisions informally amended by constitutional desuetude are likely to reflect a discontinuity between the text and the unwritten constitution. For jurisdictions like the United States where the written constitution is venerated largely because it is written,<sup>305</sup> this disjunction is problematic. Constitutional desuetude distorts the true content of the written constitution, and does not correct the false impressions it creates.

## V. CONCLUSION

That constitutions may be informally amended by constitutional desuetude is a useful contribution to the growing literature on constitutional change. I have shown how constitutional desuetude occurs and I have posited a seven-part framework for identifying and anticipating its occurrence in constitutional states. I have illustrated constitutional desuetude in Canada, arguing that both the British and Canadian powers of reservation and disallowance were informally amended out of the constitutional text by constitutional desuetude. I have also countered the conventional view that the Ca-

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303. Jane Pek, *Things Better Left Unwritten?: Constitutional Text and the Rule of Law*, 83 NYU L. REV. 1979, 1985-87 (2008).

304. MICHAEL FOLEY, *THE SILENCE OF CONSTITUTIONS: GAPS, "ABEYANCES" AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT* 5-6 (2d ed. 2011).

305. See Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 639 (2006); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 769 (1988); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 557 (1985); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 314-15 (2001).

nadian federal and provincial legislative override have fallen into desuetude. Using the theory of constitutional desuetude, I have shown that neither power has yet been informally amended by constitutional desuetude but that the federal power of legislative override is at greater risk of constitutional desuetude.

Constitutional desuetude recognizes that the constitution comprises more than what is entrenched in the text. It helps us better align constitutional law with political reality, acknowledges that “the great conceit of constitution-makers is to believe that the words they put in the constitution can with certainty and precision control a country’s future,”<sup>306</sup> and begins from the proposition that constitutional law and adjudication “are necessarily rooted in social facts involving the behaviors, expectations, and attitudes of their participants.”<sup>307</sup> Constitutional desuetude therefore builds on the study of constitutional custom and convention, both of which create political precedents that may sometimes conflict with what is written as constitutional or statutory law.<sup>308</sup> As Hans Kelsen cautioned, “there is no legal possibility of preventing a constitution from being modified by way of custom, even if the constitution has the character of statutory law, if it is a so-called ‘written’ constitution.”<sup>309</sup> Accordingly no study of constitutional change, whether formal or informal amendment, is complete without attention to how the constitutional text interrelates with constitutional customs and conventions.<sup>310</sup>

The study of constitutional desuetude has important applications in constitutional law, constitutional design and constitutional theory. With respect to constitutional law, it would be useful to explore whether and how constitutional desuetude arises beyond Canada. Future studies might probe the United States Constitution for occurrences of existing or anticipated constitutional desuetude. It may also be profitable to investigate constitutional desuetude in other long-standing liberal democratic constitutions, namely the 1814 Norwegian Constitution, the 1900 Australian Constitution, the 1920 Austrian Constitution, the 1947 Japanese Constitution, the 1950 Indian Constitution, the 1953 Danish Constitution and the 1958 French Constitution. Subnational constitutions should also factor into future studies, particularly those state constitutions in the United States that predate the national constitution. They could conceivably entrench constitutional provisions that have long since fallen into obsolescence.

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306. RUSSELL, *supra* note 151, at 34.

307. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1113 (2008).

308. BAYARD REESOR, *THE CANADIAN CONSTITUTION IN HISTORICAL PERSPECTIVE* 105 (1992).

309. KELSEN, *supra* note 94, at 259.

310. JENNINGS, *supra* note 113, at 74.

Constitutional design and constitutional theory are also fertile ground for further research. Both raise interesting questions about how to guard against constitutional desuetude. Our first inclination may be to authorize courts to police the text for constitutional desuetude, either in the context of litigation or at their own initiative. Yet there are alternatives. Constitutional states could create a modern analogue of the Council of Censors to review periodically the constitution for disjunctions between the text and political reality.<sup>311</sup> This standing commission would possess the power to assuage the tensions created by constitutional desuetude. Other questions would of course follow, namely whether the national court of last resort would have appellate review over the commission, and whether the constitutional text should entrench the commission's powers or whether it should be created by law or executive order. These questions assume that constitutional desuetude is problematic. But it might not be. We should therefore also clarify for ourselves whether the phenomenon of constitutional desuetude is problematic.

There remains much to learn about constitutional desuetude. The study of comparative constitutional change will only grow stronger with further research into the phenomenon of constitutional desuetude, how and why it happens and manifests itself, what its costs and effects are to constitutionalism, whether and how its occurrence can be anticipated and subsequently reversed, and who among political actors is best situated to identify and respond to it. The study of constitutional desuetude is equally important for a more fundamental reason: it returns our focus to the constitutional text. Informal constitutional change has shifted our attention from the text toward the judiciary and other political actors whose interpretations and actions effectively entrench unwritten constitutional amendments. Constitutional desuetude begins from the proposition that the text matters but recognizes that constitutional meaning today commonly evolves extratextually.

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311. For historical background on the Council of Censors, *see generally* Lewis Hamilton Meader, *The Council of Censors* (1899) (examining the origins, design, and effectiveness of the Council of Censors).